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ABSTRACT

The book discusses the implications of Section 504 of the Rehabilitation Act of 1973 on providers of health, education, and social services for the handicapped in the state of New Jersey. Among the aspects covered are a general overview; general provisions of Section 504; program accessibility; building codes; a model transition plan; employment practices; preschool, elementary, and secondary education; postsecondary education; health, welfare, and social service providers; special populations (including alcohol and drug addicts, epileptics, blind, deaf, and mentally handicapped); self-evaluation procedures; and enforcement. (DLS)

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THE IMPLICATIONS OF SECTION 504 OF THE REHABILITATION ACT OF 1973 ON HEALTH, EDUCATION, AND SOCIAL SERVICE PROVIDERS IN NEW JERSEY

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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FOREWORD

Section 504 of the Rehabilitation Act of 1973 has been termed by some a "Civil Rights Act for the Handicapped." While all would not agree with the operation, there is little doubt that the legislation will have profound effect on the lives of handicapped persons for many generations to come. It is truly a landmark in the struggle of the disabled to achieve full status as contributing citizens in American society.

For Section 504 to achieve full meaning, providers of health, education, and social services must completely understand its goals and its mechanisms. It must be viewed not as a compendium of bureaucratic dictum, but rather as the framework for a truly vital effort with an unassailable purpose. Therefore, our first goal has been to inform why. One of the great strengths of Americans is that we comply, willingly and with enthusiasm, when we understand and support the purposes of our laws.

Our second goal has been to foster a uniformity of approach among New Jersey providers. Our disabled consumers have complained, long and rightfully, that what is true in one agency often times is false in another. Therefore, we strongly encourage the widest possible use of the model plans and procedures included in this book.

Our third goal has relation directly to disabled consumers. We hope this work can make them more knowledgeable concerning their rights. Disabled consumers have a direct role to play in 504 implementation, but they must do their homework and know the ground rules to maximize their value.

We wish to acknowledge the great contributions of Mr. George R. Chizmadia, Director of the Division of Vocational Rehabilitation Services. He contributed the germ of the idea for the project, the prestige of his office, his talents as an administrator, and his support as a friend.

The Word Processing Center of the Department of Labor and Industry, particularly Annette Boyer, did a yeoman job in typing the manuscript. Mrs. Charlotte Pierce of the Governor's Committee on Employment of the Handicapped helped immeasurably with the myriad details of administration. Our daughter, Karen, taped the text for the blind.

We must particularly thank the men and women of the many New Jersey agencies, public and private, who acted as seminar participants or resource persons. A list of these fine people is on the following pages. Any measure of success this project may have, we gratefully share with you.

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STATE OF NEW JERSEY
DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF VOCATIONAL REHABILITATION SERVICES

SECTION 504 OF THE REHABILITATION ACT OF 1973

SEMINAR AGENDA

June 20, 1978

1-2 p.m.

Topic: Introduction - Historical Perspective, Overview of the Legislation, and Implementing Rules and Regulations

Resource: Seminar Leader

2:10-3:10 p.m.

Topic: Sub-part A - The definition of "handicapped," alcoholism and drug addiction, types of discrimination prohibited, administrative requirements, due process

Resource: Executive Secretary, Governor's Committee on Employment of the Handicapped

3:20-4:20 p.m.

Topic: Sub-part C - Program Accessibility - definition of the concept, consumer input, examples from various modalities

Resource: Seminar Leader

June 22, 1978

1-2 p.m.

Topic: Barrier Free Design Codes and Standards - New Jersey Administrative Code, the ANSI Standard, Appeals and Enforcement

Resource: State Architect's Office

2:10-3:10 p.m.

Topic: Transition Plans - Model Analysis

Resource: Seminar Leader

3:20-4:20 p.m.

Topic: Sub-part B - Employment practices - employment inquiries, nondiscrimination in testing, medical implications, interface with Affirmative Action requirements, grievance procedures

Resource: Representative of Region 2, United States Department of Labor.

June 27, 1978

1-2 p.m.

Topic: Sub-part D - Primary and Secondary Education - Interface with Public Law 94-142, the pre-school question, ancillary programs, application to private schools, New Jersey Administrative Code

Resource: Representative of the New Jersey Department of Education, Bureau of Pupil Personnel Services

2:10-3:10 p.m.

Topic: Sub-part E - Colleges and Universities - Educational "Program Accessibility," consortia, ancillary service requirements

Resource: Representatives of College Programs for the Handicapped

3:20-4:20 p.m.

Topic: Sub-part F - Social Service and Health Providers - Individualized programs and their interface, small providers, auxilliary aids

Resource: Director of the Division of Vocational Rehabilitation Services

June 29, 1978

1-2 p.m.

Topic: Special Populations - Architectural considerations, mechanical aids, particular problems of mental health and retardation, the epileptic

Resource: Superintendent, Marie H. Katzenbach School for the Deaf; Director of Vocational Rehabilitation Services, New Jersey Commission for the Blind and Visually Impaired; Representative of the Association for Retarded Citizens, New Jersey Mental Health Association

2:10-3:10 p.m.

Topic: Self-evaluation - Analysis of the typical agency plan, consumer input

Resource: Seminar Leader

3:20-4:20 p.m.

Topic: Sub-part G - Enforcement - Procedures, relationship to due process, discussion of recent case law

Resource: Advocate for the Developmentally Disabled, New Jersey Office of Public Advocate, New Jersey Department of Law and Public Safety and Region 2, Office on Civil Rights, U.S. Department of HEW

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CHAPTER I

INTRODUCTION

> Today I am issuing a regulation pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans--the blind, the deaf, persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps.
>
> The 504 Regulation attacks the discrimination, the demeaning practices, and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law.

The above statement was made by Joseph A. Califano Jr., Secretary of Health, Education, and Welfare, on April 28, 1977, when he issued the regulation implementing Section 504 of the Rehabilitation Act of 1973, Public Law 93-112. The Section 504 regulation will effect fundamental changes in many facets of American life, in the actions and attitudes of institutions and individuals toward handicapped persons. It has been called by many "a Civil Rights Act for the Disabled."

Unfortunately, serious misinterpretations of the regulation's requirements have been prevalent since it was promulgated.[1] In New Jersey, this situation has resulted in confusion, duplication of effort, and a generally uncoordinated, potentially wasteful pattern of implementation.[2] The purpose of this training project is to facilitate the provision of necessary information and encourage a uniform approach to problems of implementation.

HISTORICAL PERSPECTIVE

The following section on historical perspective will capsulise the developments bearing on the enactment of Public Law 93-112 and the ultimate promulgation of its regulation. This historical perspective should prove quite valuable in determining the intent of the Congress when the legislation was enacted. It should also shed light on the thinking which went into the drafting of the regulation.

On December 9, 1971, Representative Charles Vanik of Ohio introduced H.R. 12154, a bill intended to amend Title VI of the Civil Rights Act of 1964 with the language which ultimately became Section 504.[3] On January 20, 1972, Senators Hubert Humphrey of Minnesota and Charles Percy of Illinois introduced S3044, a parallel bill, into the Senate.[4] Senator Humphrey's remarks at that time are worth examining:

> I introduce a bill to ensure equal opportunities for the handicapped by prohibiting needless discrimination in programs receiving federal financial assistance. The time has come when we can no longer tolerate the invisibility of the handicapped in America. These are people who can and must be helped to help themselves.[5]

The Congress chose not to amend the Civil Rights Act but, rather, by an action of the Senate Committee on Labor and Welfare, included Section 504 in the Rehabilitation Act. However, on October 27, 1972, President Richard M. Nixon announced his pocket veto of the proposed legislation. On March 27, 1973, President Nixon vetoed the act a second time. A concerted drive to overturn the veto was mounted in the Congress but the Senate sustained the President on April 3, 1973 by a vote of 60 to 37, seven short of the required two-thirds majority. President Nixon signed the bill on September 25, 1973, in a version which scaled down monetary appropriations to rehabilitation agencies.[6]

It is interesting to note that Title V, in general, and Section 504, in particular, were not a part of the national debate on the Rehabilitation Act. President Nixon had characterized the Act as "...a congressional spending spree..." which would "...dip into the pockets of millions of men and women..." and "...cruelly raise hopes of the handicapped in a way that we would never responsibly hope to fulfill...."[7] Thus, the primary questions at that time were monetary and national attention was not focused on the ramifications of Section 504.

Section 504 had no real force without an implementing regulation and this regulation was not forthcoming during 1974. However, other Congressional action during that year is important to us in assessing the intent of Congress. The Senate Subcommittee on the Handicapped, a branch of the Senate Labor and Welfare Committee, drafted the Rehabilitation Amendments of 1974. In its report, the committee stated: "The committee understands that HEW's Section 504 Regulations should be completed by the close of this year."[8] The House-Senate Conference Committee on the 1974 Amendments stated: "The conferees fully expect that HEW's Section 504 Regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act was enacted over one year ago."[9]

President Ford vetoed the Rehabilitation Amendments of 1974, which included changes affecting Section 504, primarily based upon its reorganization of the Social and Rehabilitation Services Administration. President Ford characterized the amendments as an "...attempt to administer by legislation...."[10] In November 1974, the Congress overrode President Ford's veto by votes of 398 to seven in the House and 90 to one in the Senate.

In 1975, agitation for the promulgation of a Section 504 Regulation became intense.

On June 3, 1975, James L. Cherry and the Action League for Physically Handicapped Adults, (ALPHA), petitioned HEW to issue a regulation promptly. When no regulation was forthcoming by February 13, 1976, Cherry and ALPHA filed suit in the U.S. District Court for the District of Columbia. A proposed regulation for Section 504 was published by HEW on July 16, 1976, just three days before District Court Judge John Lewis Smith, ruling on Cherry v. Mathews, ordered HEW to promulgate a regulation without delay.[11]

During the remainder of 1976, the Department of Health, Education, and Welfare engaged in a massive attempt to gather public commentary on the proposed regulation. The Department conducted a series of 22 "town meetings" and ten regional seminars which were attended by about 4,000 persons in 27 States. More than 96,000 copies of the proposed regulation were distributed to the public. In addition, 1,511 copies were produced in braille and 4,000 copies were made into recorded discs so that the visually impaired might participate in the comment process. The Department received more than 1,000 written comments. A final regulation reflecting an analysis of the comments was presented to former Secretary Mathews on January 10, 1977.[12]

Secretary Mathews declined to sign the regulation before he left office. On January 18, 1977, Secretary Mathews forwarded the unsigned regulation to Senator Harrison Williams of New Jersey stating that he felt the necessity for "...Congressional acknowledgement of the regulation's being consistent with the law...."[13] Thus, when the Carter Administration entered office on January 20, 1977, the Section 504 regulation still had not been implemented.

In March 1977, the new HEW Secretary, Joseph A. Califano Jr., announced his intention to have a full intradepartmental review of the proposed regulation. Dismayed, handicapped persons protested by occupying the Washington offices of HEW for 28 hours and the San Francisco offices for 22 days. Demonstrators used hunger strike techniques. Bowing to the pressure, Secretary Califano signed the final regulation on April 28, 1977.[14]

Much has been made of the fact that there was little Congressional debate concerning Title V of the Rehabilitation Act of 1973.[15] However, it must be said that the committee which wrote the section was fully aware of its ramifications. Senator Cranston of California stated that the framers of the section envisioned a vigorous implementation of Section 504. Senator Stafford of Vermont drew attention to its similarities with existing civil rights legislation in his statement:

> It was the committee's intent that the enforcement under Sections 503 and 504 would be similar to that carried out under Section 601 of the Civil Rights Act and 901 of the Education Amendments of 1972."[16]

President Carter made a strong statement on the commitment of his administration to Section 504 in the following remarks made on May 23, 1977:

> The Bill of Rights for Handicapped Individuals was spelled out in Title V of the Rehabilitation Act of 1973 and we are going to enforce the regulations that are specified in that bill. We are going to enforce the regulations that tear down the barriers of architecture and we are going to enforce the regulations that tear down the barriers of transportation ...., As you know, Section 504, of which I am sure you have all heard, and of which I am sure now that Joe Califano has also heard, has provided a framework for the regulations that have now been adopted, and Joe Califano assures me and he assures you that these regulations are going to be enforced.[17]

OVERVIEW

Below is the exact wording of Section 504 as it appears in the Rehabilitation Act of 1973, Public Law 93-112:

NON DISCRIMINATION UNDER FEDERAL GRANTS

> No otherwise qualified handicapped individual in the United States, as defined in section 7 (6) shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Below is the statuatory definition of "handicapped individual" from Section 7 (6):

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to Titles I & III of this act.

The definition of "handicapped individual" was changed, and greatly broadened, in the Rehabilitation Amendments of 1974, Public Law 93-516. The amended text is quoted below:

> For the purposes of Titles IV and V of this Act, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

The regulation is divided into seven subparts: 1) General Provisions, 2) Employment Practices, 3) Program Accessibility, 4) Preschool, Elementary, and Secondary Education, 5) Postsecondary Education, 6) Health, Welfare, and Social Services, and 7) Procedures.
In the remaining chapters, each of these seven subparts will be discussed thoroughly. At this time, however, we will give a brief overview of the most salient features of the regulation.

Definition of Handicapped Individual

The term handicapped includes such diseases or conditions as speech, hearing, visual, and orthopedic impairments; cerebral palsy; epilepsy; multiple sclerosis; cancer; diabetes; heart disease; mental retardation; emotional illness; and specific learning disabilities such as perceptual handicap, dyslexia, minimal brain dysfunction, and developmental aphasia. In accordance with a formal opinion of the Attorney General of the United States, alcohol and drug addicts are also considered handicapped individuals.[18] Physical or mental impairments do not constitute handicaps, however, unless they are severe enough to limit one or more of the major life functions substantially.

Employment Practices

As employers, recipients of federal funds are expected to follow a standard of "reasonable accommodation" to the known physical or mental limitations of a handicapped person, unless it can be demonstrated that doing so would impose "undue hardship." Some reasonable accommodations, other than architectural changes, could be the revisions of schedules, acquisition of equipment to compensate for disabilities, or job restructuring to allow nonhandicapped employees to perform certain tasks that would otherwise be included in a particular job. Additionally, promotion, training, transfer, and similar criteria must be fairly applied to handicapped employees. Pre-employment inquiry can not be made about a person's handicapping condition, although employers may ask about an applicant's ability to perform job-related functions. Employers may make an offer of employment conditional on a medical examination, as long as the examination is required of all employees and no one is disqualified on the basis of a physical condition that is not job-related.

Program Accessibility

The regulation provides that programs must be accessible to handicapped persons. It does not require that every building or part of a building be accessible, but that a program as a whole be accessible. Structural changes to make a program accessible must be made only if alternatives, such as reassignments to accessible locations, are not possible. The intent is to make all benefits or services available to handicapped persons. Recipients are given three years to complete structural changes to physical plants; nonstructural changes must be made in 60 days from the effective date of the regulation. In meeting the objective of program accessibility, a recipient must take care not to isolate or concentrate handicapped persons in settings away from their nonhandicapped peers.

Preschool, Elementary, and Secondary and Adult Education

The requirements are summarized below:

- Annual identification and location of unserved handicapped children.
- Free appropriate public education to each qualified handicapped child regardless of the nature or severity of the handicapped, including coverage of nonmedical care and room and board where residential placement is required.
- Education with nonhandicapped students to the maximum extent possible.
- Comparability of facilities, including services and activities, identifiable as being for handicapped persons.

- Evaluation requirements to insure proper classification and placement of handicapped children and "due process" procedural safeguards.
- Equal opportunity for participation of handicapped students in nonacademic and extracurricular services and activities.

Postsecondary Education

In colleges and universities, recruitment, admissions, and treatment of students must be free of discrimination. Quotas for handicapped persons are proscribed, as are preadmission inquiries as to whether an applicant is handicapped. Higher education institutions must assure accessibility of programs and activities to handicapped students and employees. Architectural barriers must be removed whenever the program can not be made accessible by other means. These other means might include rescheduling of classes to accessible buildings. Handicapped students should have the same options as other students in selecting their courses. Students with impaired sensory, manual, or reading skills, must be provided auxiliary aids, although this may be done by informing them of resources provided by governmental or charitable organizations. Colleges and universities must make reasonable modifications in academic requirements, when necessary, to assure full educational opportunity for handicapped students. Such modifications may include the extension of time for completing degree requirements, adaptation of the method by which the specific courses are conducted, and elimination of rules prohibiting handicapped persons from having tape recorders in class or guide dogs on campus. Physical education must be provided in a nondiscriminatory manner and handicapped students can not be

unnecessarily segregated in physical education classes. Additionally, opportunities for accessible housing for disabled students must be comparable to nondisabled housing. There can be no discrimination in student financial and employment assistance programs. Also, there must be equal opportunity for participation of handicapped students in nonacademic and extracurricular services and activities.

Health, Welfare, and Social Services

The provisions for accessibility and reasonable accommodation that apply to other programs also apply to health, welfare and social service providers. Benefits and services may not be denied on the basis of handicap. Providers of these services may find it necessary to remove barriers, make house calls, or meet handicapped people in offices that are accessible. Further, providers must ensure that persons with impaired sensory skills are provided effective notice concerning the provision of benefits, waiver of rights, and consent to treatment. Hospitals must make special arrangements for handling deaf patients. Health, welfare, and social services provisions for handicapped people must be equal in quality to those in an institution's overall program and equitable standards of eligibility are required.

Enforcement

The enforcement procedures for Section 504 are a direct copy of the procedures from Title VI of the Civil Rights Act of 1964. Basically, it is a complaint oriented procedure. Individuals may file a complaint of discrimination with the Office for Civil Rights, Department of Health, Education, and Welfare. The Office for Civil Rights will investigate the complaint and, if possible, attempt to settle it amicably. If necessary, a formal hearing may ensue. Ultimately, the Office for Civil Rights could petition for the cessation of all federal monies from the recipient.

DISCUSSION QUESTIONS

1. Do you think handicapped individuals still desire protection in the form of an amendment to the Civil Rights Act of 1964? Is Section 504 really a "Civil Rights Act for the Disabled"?

2. Do you believe that Congress actually gave sufficient consideration to Section 504? Is this still a relevant question today?
3. Do you believe that Secretary Mathews was justified in asking Congress to review the Section 504 Regulation to assure its compliance with the law?

4. The concepts of "program accessibility" and timetables for removing architectural barriers are anathema to many disabled individuals. Do you believe that "total accessibility" is a civil right guaranteed to every disabled individual?

REFERENCES

1. U.S., Congress, House, Committee on Education and Labor, Subcommittee on Select Education, Implementation of Section 504, Rehabilitation Act of 1973, Hearing, 95th Congress, 1st Sess., September 9, 13, and 16, 1977 (Washington: Government Printing Office, 1977), p. 215. The statement was made by Dr. Frank Bowe, Director, American Coalition for Citizens with Disabilities.

2. Statement by George R. Chizmadia, Director of the New Jersey Division of Vocational Rehabilitation Services, personal interview, Trenton, New Jersey, December 10, 1977. Permission to quote granted.

3. 117 Congressional Record 4945 (1971).

4. 118 Congressional Record 525 (1972).

5. Ibid.

6. The New York Times, September 27, 1973, p. 14.

7. The New York Times, March 28, 1973, p. 1.

8. "Legislative History of Section 504," Amicus, Vol. 2, No. 5 (September 1977), p. 34. 9. Ibid.

10. The New York Times, October 30, 1974, p. 14.

11. Amicus, p. 35. The case cited was Cherry, et al. v. Mathews, et al., No. 76-0255, U.S. District Court for the District of Columbia.

12. Subcommittee on Select Education Hearings, p. 293. From a statement by David Tatel, Director, Office for Civil Rights, Department of Health, Education, and Welfare.

13. Letter from David Mathews, Secretary of Health, Education, and Welfare, to the Congress of the United States, January 18, 1977.

14. The New York Times, April 29, 1977, p. 10.

15. Mathews to Congress. The same point was also made by David Tatel in his testimony before the Subcommittee on Select Education. See page 291 of the transcript of the hearings.

16. Subcommittee on Select Education Hearings, p. 32.

17. Opinion expressed by President Jimmy Carter in an address to the White House Conference on Handicapped Individuals at Washington, D.C., May 23, 1977.

18. U.S., Department of Health, Education, and Welfare, Handicapped Persons; Rights Under Federal Law, (Washington: Government Printing Office, July, 1977), p. 1.

CHAPTER II

GENERAL PROVISIONS

To understand thoroughly how the regulation will effect their own particular circumstances, it is essential that recipients study each subpart. For instance, an employer who receives financial assistance from HEW must comply not only with Subpart B, Employment Practices, but also with provisions of Subparts A, General Provisions, and C, Program Accessibility, as well. Similarily, postsecondary educational institutions must be aware not only of the provisions in Subpart E, Postsecondary Education, but also of the requirements of Subparts A, B, and C. Each subpart does not exist independently from the others; they must all be considered as a whole.

The title of Subpart A is General Provisions. It consists of Sections 84.1 through 84.10 of Part 84, Subtitle A, Title 45, Code of Federal Regulations. In overview, it defines the important terms that are used throughout the regulation and states generally the discriminatory acts that are prohibited. It also sets forth the system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employees and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap.

Purpose

Section 84.1, Purpose, is self-explanatory. It states that the purpose of the regulation is to implement Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving federal financial assistance.

Applicability

Section 84.2 states the applicability of the regulation. It applies to every recipient of federal financial assistance from the Department of Health, Education, and Welfare. In addition to this applicability, the regulations will, in the future, have impact on recipients of funds from Federal agencies other than Health, Education, and Welfare. Executive Order 11914, signed by President Gerald R. Ford in April 1976, requires HEW to coordinate the implementation of Section 504 by all federal departments and agencies, so that consistent policies, practices, and procedures are adopted.[1] Therefore, to achieve the consistency required by the Executive Order, the implementing regulations issued by other federal agencies will undoubtedly closely resemble the HEW regulation for Section 504. HEW published its regulation implementing Executive Order 11914 in January 1978 and we are already seeing the first of the implementing regulations from other federal agencies.[2]

Definitions

Section 84.3 defines terms as used in the regulation. Four of these definitions warrant our attention; "recipient," "federal financial assistance," "handicapped person," and "qualified handicapped person."

The regulations define "recipient" as "...any state or its political subdivision, any instrumentality of a state or its political subdivisions, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient...." This definition includes providers under the Medicaid program, even if Medicaid is their sole source of Federal financial assistance. In the commentary accompanying the regulation, HEW recognizes the difficulties involved in enforcement

with respect to the thousands of individual Medicaid providers. HEW states that it will concentrate its compliance efforts on the state Medicaid agencies and look to them to ensure compliance by individual providers.[3]

The term "recipient" does not include private elementary and secondary schools merely because their students may be participating in other programs which receive federal funds, reduced cost school lunches for example. This is consistent with interpretations involving Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which have almost identical language for the definition of "recipient" in their implementing regulations.[4]

The second definition warranting our attention is "Federal financial assistance." It is defined as "...any grant, loan, contract or any other arrangement by which (HEW) provides...1) funds, 2) services of federal personnel, 3) real or personal property or any interest in or use of such property...." The key point in this definition is that it excludes contracts of procurement and contracts of insurance or guaranty. Thus, Section 504 is not applicable to one who does business with the federal government but rather to one who receives assistance from the federal government. However, those with procurement contracts of over $2,500 are covered by Section 503 of the Rehabilitation Act, administered by the Department of Labor. Requirements are similiar.

To determine whether contracts of insurance or guarantee should be included or excluded from the definition of "Federal financial assistance," HEW reviewed the same legislative history which we went over in Chapter 1. A key point was Senator Stafford of Vermont drawing attention to the similarities of Section 504 with existing civil rights legislation

in his statement: "It was the committee's intent that the enforcement under Sections 503 and 504 would be similiar to that carried out under Section 601 of the Civil Rights Act and 901 of the Education Amendments of 1972."[5] Both Title VI and Title IX contain statuatory exemptions for contracts of insurance or guarantee.[6] By extension, HEW concluded that Congress did not intend Section 504 to apply to such contracts. The most significant effect of this interpretation is that it excludes medical practitioners and hospitals reimbursed for services to patients receiving Medicare Part B, if this is their only source of federal financial assistance. Medicare Part B, like other social security programs, is a contract of insurance or guaranty.

The third definition of interest is "handicapped person." The definition in the regulation is very similar to the one in the statute and includes "...any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." The first of the three parts of this definition specifies that only physical and mental handicaps are included. Cultural and economic handicaps are not included, nor are prison records, age, or homosexuality. Drug and alcohol addiction are included; more on this later. The definition does include specific learning disabilities. (HEW has stated that it will use Section 602 of the Education of the Handicapped Act, Public Law 94-142, for its definition of the term.[7] This section includes such conditions as perceptual handicap, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.)[8] The definition would also include such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; cancer; heart disease;

mental retardation; and emotional illness; to the degree that they substantially limit one or more major life activities. The term "major life activities" means caring for one's self, walking, seeing, hearing, speaking, breathing, learning, and working.

The second portion of the definition, "has a record of such impairment," includes persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly diagnosed. Here the regulation seems to be speaking clearly of prevalent discrimination based on history of conditions such as heart disease, cancer, and emotional disorder.

The third portion of the definition, "regarded as having such an impairment," includes persons who are ordinarily considered to be handicapped, but, who do not technically fall within the first two parts of the definiton. An example might be persons with disfiguring scars or physical deformities.

There has been considerable controversy over the fact that alcoholism and drug addiction are covered under the definition. There are, however, limitations on the implications of this definition. An employer is not required to change hiring or retention standards regarding performance or disruptive, abusive, or dangerous behavior, even if these actions stem from a person's alcoholism or drug addiction. Additionally, a school is not prohibited from applying rules concerning use of drugs and alcohol to students with addiction problems, as long as the rules apply equally to all students. Social service agencies may not deny services per se but may take manifestations of the conditions into consideration when determining program eligibility. A reasonable synopsis of HEW's position is that the alcoholic or drug addict may not be denied services or

disqualified from employment based solely on his or her condition, but the behavioral manifestations of the condition may be taken into account. If it can be shown that addiction or alcoholism prevents successful performance, the person need not be admitted, hired, or retained. Additionally, rules prohibiting possession or use of alcohol and drugs may be enforced.

In the author's opinion, the Section 504 Regulation concerning employment of the alcoholic and drug addict is flawed, since it makes no distinction between an individual who is practicing and an individual who has recovered. The recovered individual will continue to be plagued by his past performance record, with no recourse under Section 504. The regulation is somewhat more effective with respect to services. Drug addicts and alcoholics can not be denied treatment at hospitals, for example, for conditions unrelated to their addiction or alcoholism. The author feels that HEW has bent over backwards in applying safeguards to a potentially sensitive area. The author concurs with Mr. W.J. Lynch, Jr., Chairman of the Washington Area Council on Alcholism and Drug Abuse, that, without significant amendment, "...the inclusion of alcoholics and drug addicts as handicapped persons is only theoretical...."[10]

The last term warranting our attention is "qualified handicapped person." With respect to employment, it means a person who, with reasonable accommodation, can do the essential functions of the job. The term essential functions is used to emphasis that handicapped persons should not be disqualified simply because they have difficulty performing tasks that are only marginally related to a particular job. With regard to elementary, secondary, and adult education, the term means any person legally entitled to the services under New Jersey Statue, Title 18A.

With regard to postsecondary educational services, the term means a handicapped person who meets the academic and technical standards required for admission. The term technical standards means nonacademic criteria that are essential for participation in the program in question. Thus, it is reasonable that a college set minimum physical standards for entry into certain majors. Rider College has established such guidelines, for example, dissuading those with impaired hearing from majors in foreign languages.[11]

Discrimination Prohibited

Section 84.4 defines the discrimination which is prohibited under the regulation. In general, any program or activity which receives federal financial assistance 1) may not exclude handicapped persons from aids, benefits, or services; 2) must provide equal opportunity to participate or benefit; 3) must provide services as effective as those provided to the non-handicapped; and 4) may not provide different or separate services except when necessary to provide equally effective benefits. The regulation recognizes the concept that services for the handicapped often can not be identical to those provided to the nonhandicapped, if equal benefit is to be achieved. The services provided to the handicapped, however, must be equivalent to those provided to the nonhandicapped and must afford an equal opportunity to achieve equal results. In addition, the services must be provided in the most integrated setting appropriate to the handicapped person's needs. The regulation further prohibits recipients from supporting entities that discriminate against handicapped persons. Finally, this section prohibits recipients from making site selections which would prevent handicapped persons from benefiting from a program or activity receiving federal assistance.

Another very key portion of this section prohibits one recipient from supporting another agency which subjects its participants or employees to discrimination based upon handicap. This, of course, raises the question of how involved State agencies must become in the affairs of local agencies to which they give financial support. In the author's opinion, state agencies have no specific requirement to conduct specific reviews of whether local recipients are in compliance with Section 504. The local level recipient's having submitted required assurances of compliance to HEW, having developed required transition plans, and having publicized appointment of responsible officials would, in the author's opinion, be sufficient prima facie evidence. The author's opinion is supported by the commentary which accompanied HEW's Notice of Intent to Issue Proposed Rules, May 17, 1976.[13] In this commentary, it was stated that HEW had not yet developed a role for the states in the implementation of Section 504 and would make such a role the subject of future rulemaking.

Several other nuances result from this section. The first concerns the guidance on site selection. Many institutions have feared that they would be unable to expand their existing facilities already located at hilly sites. Such is not the case; the section is not intended to apply to construction of additional buildings at an existing site. Of course, any such new facilities must be made accessible in accordance with architectural standards.

A second nuance concerns programs which are limited by Federal law. One may exclude non-handicapped from a program limited by Federal statute to handicapped persons. One may exclude all but a specific class of

handicapped persons from a program so limited by Federal statute. An example would be the blind operated newsstands in Federal buildings.

The third nuance concerns a rather enigmatic portion which states that although separate programs may be permissible, qualified handicapped persons must be given the option of participating in regular programs. The author believes this portion applies to a situation in which a handicapped person could, reasonably, participate either in a segregated program or the regular program. It would be perfectly permissible for a college to set up a swimming team composed entirely of handicapped persons. That same college, however, could not deny a paraplegic the opportunity to compete for a place on the school's regular swimming team. A Board of Education could send a deaf student to the Marie H. Katzenbach School but the parents of that same student, if he or she is educationally qualified, could insist upon "mainstreaming" with interpreter services.

Assurances

Section 84.5 covers Assurances of Compliance. Recipients are required to sign and submit an Assurance of Compliance, HEW Form 641. This is a long-standing procedure already required under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The assurance represents a good faith commitment to comply with the statute and regulation. It is considered a contract that, in effect, conditions receipt of federal financial assistance on compliance with Section 504 and its implementing regulation.

In May 1977, HEW sent assurance forms to approximately 36,000 recipients of Federal funds. As of September 1977, over half the forms had been returned, more than 14,000 of them acceptable. In October 1977, a second letter was sent to those agencies which had not yet replied, alerting them to potential enforcement action. HEW has stated that in cases where it is not possible to obtain voluntary compliance with this requirement, it will institute enforcement action.[14]

Remedial Action and Self Evaluation

Section 84.6 covers remedial action and self-evaluation. If the Director of the Office of Civil Rights finds that a recipient of federal funds has violated Section 504 or its regulation, the recipient may be required to take such remedial action as the Director deems necessary to remedy the effect of the discrimination. Remedial action may be required if the discrimination is current or it may also be required if handicapped persons no longer participate in the program but were subject to discriminatory treatment or were denied participation in the past. In effect, the Director may require an Affirmative Action Program similiar to those required under Section 503. The second key feature of this section is that recipients are required to conduct a self-evaluation of current policies and procedures and to take action to modify any discriminatory practices by June 2, 1978. This self-evaluation is to be made in consultation with handicapped persons or organizations representing the handicapped. If the recipient employs 15 or more persons, records must be maintained for three years of the persons consulted, descriptions of areas examined, problems identified, and corrective steps taken. These records must be available for public inspection.

The requirement to include handicapped persons in the self-evaluation process should make for considerable efficiencies. The literature gives many examples of overreaction to providing for the needs of the handicapped. An example, from a university environment, concerned a student who was deaf and partially paralyzed. The problem was to provide a way for the student to obtain class notes. The university suggested providing a transcriber who would type up the lecture verbatim from a tape recording. When the university consulted with the student and other disabled people for advise, it was told that its solution was too costly and would probably provide the notes too late. The disabled suggested a simpler and cheaper solution; provide two or three students in the class with carbon paper to insert under their notepads.

Grievances

Section 84.7 requires that any recipient with 15 or more employees shall designate at least one person as responsible for its effort to comply with Section 504. Recipients with fifteen or more employees must also adopt grievance procedures, including appropriate due process standards, that provide for prompt and equitable resolution of complaints. The regulations do not require that these grievance procedures be exhausted before recourse is sought from HEW. Grievance procedures are not required for unsuccessful applicants for employment or for unsuccessful applicants for admission to colleges and universities.

HEW made no attempt to detail the grievance procedures required because of the varied nature of the programs to which the regulations apply. It is clear however that the procedures must include the

possibility of grievance submission by participants, beneficiaries, and employees. The following are offered as the author's opinion on minimal requirements of due process:

1. Participants, beneficiaries, and employees must be assured that they may submit grievances without fear of reprisals.

2. At least a two step procedure should be provided, an initial review and an appellate review.

3. A definite time schedule for the grievance procedure should be established.

4. Records of the processing of the grievance should be maintained.

5. The grieving person should be informed of his or her rights for continuation at each step of the process.

6. Accommodations to the needs of disabled grievants should be made.

Some New Jersey agencies already have grievance procedures with due process requirements built into Administrative Code. For example, grievance procedures concerning the placement of handicapped children in the educational process are covered in New Jersey Administrative Code, Title VI, Chapter 28. The author has provided a model grievance procedure, appliable to the employment situation as Attachment 1 to this Chapter.

Notification

Section 84.8 requires recipients which employ fifteen or more persons to take initial and continuing steps to notify beneficiaries and employees that it does not discriminate on the basis of handicap. HEW has avoided dictating the precise way in which this notice must be given. Possibilities include posting on bulletin boards, distribution of memoranda, and inclusion in recipient's publications. If a recipient

uses recruiting material or has a general information publication, such publications should include a statement of non-discrimination on the basis of handicap. Many New Jersey recipients already publish statements of non-discrimination on the basis of race, religion, sex, and age. It is perfectly permissible, in fact encouraged, to add handicap to such nondiscrimination statements.

Section 84.9 allows the Director of the Office of Civil Rights to rescind the simplification of administrative requirements presently allowed for recipients having less than fifteen employees. He would ordinarily do so only in case of a violation.

Section 84.10 states that the obligation to comply with the regulation is not changed by the existence of any local or state law or code that prohibits or limits the eligibility of qualified handicapped persons. Interesting, handicapped persons have a powerful tool to use against discriminatory state and local laws. Ordinarily, courts may not award attorneys fees in cases involving discrimination under Section 504. The Civil Rights Attorneys Fees Award Act of 1976, Public Law 94-559, allows courts to award such fees for civil rights litigations for other minorities and women. However, cases brought to enforce 42 U.S.C. 1983, which prohibits persons acting under State law from depriving any other person of lawful rights or privileges, are covered by Public Law 94-559. Thus, attorneys fees can be recovered in actions brought against public officials challenging the deprivations of rights secured by Section 504.

This section also prohibits colleges and universities from denying admission because of limited opportunities in a particular field for handicapped persons. Thus, a teachers' college could not deny an orthopedically handicapped applicant admission because orthopedically handicapped teachers find it more difficult to obtain jobs.

DISCUSSION QUESTIONS

1. Do you feel recipients of Federal contracts of procurement should be required to comply with Section 504 as well as Section 503? What would be the practical effects of such an extension?

2. A qualified handicapped person with respect to postsecondary education is defined as one who meets both academic and technical standards. Do you feel the allowance of technical standards represents a flaw in the regulation?

3. The regulation allows a recipient to expand facilities on an existing hilly site. Do you feel this will cause significant difficulties with non-accessible facilities?

4. The regulation allows a qualified handicapped person to participate in the regular "mainstream" program even though a permissible segregated program exists. What do you think the practical effect of this rule will be?

5. Does your agency have a procedure for handling grievances submitted under Section 504 or its implementing regulation? If so, does it have any features of general interest to the group?

METROPOLIS WORKSHOP

METROPOLIS, NEW JERSEY

June 10, 1977

GRIEVANCE PROCEDURES

ALLEGATIONS OF DISCRIMINATION BASED ON HANDICAP

1. Policy.
It is the policy of this workshop not to discriminate on the basis of handicap. All employees will be treated equally as concerns job assignments, transfers, promotions, training opportunities, attendance at professional meetings, fringe benefits, reductions in staff, etc. The workshop recognizes that to provide such equal opportunity, it may sometimes be necessary to make certain adjustments or accommodations. It is the policy of this workshop to make such adjustments and accommodations to the degree considered reasonable.

2. Grievances.
Any employee has the right to submit a greivance if he or she feels discriminated against on the basis of handicap in contradiction of the policy stated above. There will be absolutely no reprisals because an employee has submitted a grievance. Grievances must be submitted within 180 days of the occurrence or the date the employee learned of the occurrence. The procedures in this directive are designed to assure a fair and equitable hearing of such grievances, with the principles of due process guaranteed.

3. Procedures.
(a) Grievances should be settled informally if at all possible. Employees should submit their grievances to their immediate supervisor, verbally or in writing within the time limit specified in paragraph 2. If the immediate supervisor is involved in the allegation, the grievance may be submitted to the next level supervisor. The grieving employee will be given a reasonable period of time, during the work day, coordinated in advance with the supervisor, for the preparation of the grievance.
b) Grievances must contain an identification of the problem and the relief desired.
c) The supervisor will prepare and maintain in file a memo for the record of all verbal grievances received.
d) The supervisor will research the grievance, coordinating with other management officials as required. The supervisor will

prepare and transmit to the employee a written answer to the grievance. A copy of the reply will be filed with the original grievance or memo for the record. Copies of the grievance or memo for the record and the answer will be provided to Mr. Staples of the Personnel Department.

e) Replies to grievances will be completed and transmitted to the grieving employee within ten working days of submission of the grievance.

f) If the reply indicates that the relief requested can not be granted, the reason (s) for denial will be indicated. Additionally, the employee will be informed of his/her rights for a formal hearing.

4. Formal Hearing.

a) Formal Hearing Procedures will not be used unless informal methods did not supply the grieving employee with the relief desired or what he/she considers an adequate reason for denial.

b) Requests for formal hearing will be submitted in writing to Mr. Peter J. Staples of the Personnel Department who has been appointed as the workshop coordinator for grievances alleging discrimination based on handicap. Requests must be received within ten working days of the employee's receipt of the decision from the informal procedure.

c) At the hearing, the grieving employee may represent him or herself or may be represented by an employee counsel or any other person. The employee has the right to call and question witnesses.

d) Requests for formal hearings must include an identification of the problem and the relief requested. It must also include the names of any employees of the workshop desired as witnesses and the name of an employee counsel, if desired.

e) Mr. Staples will schedule the formal hearing not earlier than ten or later than fifteen working days from receipt of the request. He will arrange for the presence of employee counsel and employee witnesses.

f) Mr. Staples will inform the supervisor involved of the hearing date. He will request the supervisor, plus any other employees the supervisor considers appropriate, to appear as witnesses. The workshop will be represented during the hearing by the supervisor or another employee of management's choice.

g) The hearing itself will be considered paid workshop time for the grieving employee, employee counsel, and any employee witnesses. The workshop, however, assumes no financial responsibility for other counsel the employee may desire or witness who are not workshop employees.

h) The grieving employee will be granted a reasonable amount of time, during the normal work day, to prepare a case prior to the formal hearing. Another employee of the grieving employee's choice may also be given a reasonable amount of time for this purpose. Time will be scheduled in advance with the supervisors concerned. Conflicts concerning scheduling will be presented to Mr. Staples for resolution.

i) Mr. Staples will function as Chairperson during the hearing. Each witness may present a statement or respond to questions by the party desiring the witnesses presence. Witnesses are also subject to questionning by the opposing party.

j) Mr. Staples will arrange for a written summary of all testimony.
k) Mr. Staples will prepare a file including all pertinent correspondence, a summary of the hearing, and his analysis of the issues involved. The file will be forwarded to the Executive Director within ten working days after the completion of the hearing.

5. Resolution of Formal Hearing. The Executive Director will review the complete file forwarded to him by Mr. Staples. He will render a decision within ten working days. A copy of the decision will be forwarded to the employee. If the decision is that the relief requested can not be granted, the reason for denial will be specified. The notification will also include information concerning the employee's rights for further appeals under Section 504 to the Office for Civil Rights, Department of Health, Education, and Welfare. Mr. Staples will maintain a complete file of the proceedings for the workshop.

6. Accommodations. The workshop will make appropriate arrangements to assure that disabled persons can participate in the grievance process on the same basis as the non-disabled. Such accommodations may include but are not limited to the provision of the interpreters for the deaf, providing taped cassettes of correspondence and summaries for the blind, or assuring a barrier-free location for the hearings. Mr. Staples will coordinate such arrangements.

7. Notice. A copy of this policy will be posted on all workshop bulletin boards. Supervisors will include a briefing on these procedures in their initial orientation of all new employees.

Clark S. Kent
Executive Director

REFERENCES

1. 41 FR 17871, April 28, 1976.

2. 43 FR 2132, January 13, 1978

3. 42 FR 22685, May 4, 1977.

4. Ibid.

5. U.S., Congress, House, Committee on Education and Labor, Subcommittee on Select Education, Implementation of Section 504, Rehabilitation Act of 1973, Hearing, 95th Congress, 1st Sess., September 9, 13, and 16, 1977 (Washington: Government Printing Office, 1977), p. 32.

6. Ibid., p. 355.

7. 42 FR 22686, May 4, 1977.

8. Ibid.

9. U.S., Department of Health, Education and Welfare, Handicapped Persons; Rights Under Federal Law, (Washington: Government Printing Office, July, 1977), p. 6.

10. Subcommittee on Select Education Hearings. p. 436.

11. Handbook of Services for Disabled Students (Rider College, Trenton, New Jersey, 1978), p.3.

12. Subcommittee on Select Education Hearings, p. 351.

13. 41 FR 20296, May 17, 1976.

14. Subcommittee on Select Education Hearings, p. 299.

15. Ibid., p. 244.

CHAPTER III

PROGRAM ACCESSIBILITY

Subpart C of Title 45, Code of Federal Regulations, Part 84, HEW's implementing regulation for Section 504, covers the subject of program accessibility with regard to recipients of federal funds. The Subpart is comprised of Sections 84.21 through 84.23.

Section 84.21 defines the discrimination prohibited and also synthesizes the intent of the Subpart in the statement: "No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unuseable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies." Section 84.22 covers procedures for the implementation of program accessibility in existing facilities; Section 84.23 covers new construction. This chapter will focus on existing facilities; new construction will be covered in the next chapter.

The key concept to bear in mind when considering program accessibility is that it is not synonymous with barrier-free design. Program accessiblity does not require a recipient to make each part of every building accessible to and useable by handicapped persons. Rather, it requires that the program or activity, when viewed in its entirety, is readily accessible to the handicapped.

The notion that institutions must eliminate all architectural barriers has gained widespread belief. This has caused some recipients to

simply pale before the enormity of the supposed task and pray that someone will bail them out with huge infusions of money. To quote David S. Tatel, Director, Office for Civil Rights, HEW:

> It has been difficult to get attention focused on program accessibility because some people seem to skim over the regulations and explanatory materials and start fretting about the widening of doors or installation of high and low water fountains in every facility at every conceivable point. A result of the misunderstanding is a rising exaggeration of potential costs of making programs accessible.
>
> Institutions that overestimate what is required and elect to do nothing at all because of this misunderstanding would do a disservice to themselves and to handicapped persons who seek a way in the door but do not ask for a flying carpet.
>
> There will be some costs and some burden on the institutions, fully anticipated by Congress in the enactment of the law and the legitimate costs will pose serious enough problem without the additional headaches caused to administrators by unfounded fears.[1]

The literature abounds with commentary on the costs of Subpart C of the implementing regulation. The popular press has frequently covered isolated and extreme problems which rarely have any significance for the vast majority of providers. To quote Daniel Yohalem of the Children's Defense Fund: "...The press covers these reports because they make entertaining news stories about that eternal strawman: the all pervasive, always bumbling, federal bureaucracy; but it is not funny...."[2] A perfect example is the case of the now famous library in Rudd, Iowa. In October, 1977, Rudd was informed that it would have to provide a ramp into its library or face withdrawal of Federal funds. It countered, in a reply picked up by nationwide news media, that a ramp would be too expensive, particularly since none of the citizens in the town use wheelchairs.[3] HEW's position, not well covered by the news media, was to explain the concept of program accessibility and to assure

Rudd that it had no intentions of immediately cutting off federal funds.[4] The end of this antidote, again not well covered by the popular media, was that Rudd has learned that a ramp is not particularly expensive and that one may not be necessary at all, if other means of providing services can be worked out.[5]

Fantastically varying cost estimates also abound in an extremely provocatively titled article, "The Price of Progress: Universities Fear They Will Be Hurt Financially by Federal Regulations to Help the Handicapped,"in the Wall Street Journal. It speaks of structural changes alone, at the University of Missouri, costing $10 million. Conversely, Boston University, with 150 buildings, put its costs of compliance at a modest $500,000. For example, Boston does not plan to even touch some 50 antique brownstone houses, about a third of its buildings, because it can easily relocate the administrative counseling functions that take place there. The Journal quotes Alfred DeGraff, Director of Disabled Student Services and, himself, a quadraplegic: "If we equip every brownstone, the cost could easily run into the millions, but, there is a difference between idealistic accessibility and functional accessibility and the intent of the law is to make programs, not necessarily buildings, accessible."[6]

There have been other hues and cries from academia. The American Council on Education estimates the cost of accessibility in higher education facilities to be $5.4 billion and ACE lawyer Sheldon Steinbach says that he has "...a gut feeling that there are not too many people out there who would benefit...."[7] Speaking for Johns Hopkins University, Estelle Fishbein characterized the program accessibility requirements of Section 504 as "...complex, ambiguous, and inflexible...."[8] David

Frohmmayer, speaking for the University of Oregon, characterized the Section as a "...grotesque intrusion on internal campus governance...."[9]

This is not to oversimplify a very complex problem; program accessibility will be costly. The U.S. Office of Education estimates that removal of architectural barriers to achieve program accessibility in elementary and secondary schools could run as high as $2.78 billion, an amount almost equal to the total proposed federal contribution under Public Law 94-142 by 1982.[10] These figures have been, at least in part, verified by Dolan in a study of costs to achieve program accessibility in New Jersey Elementary and Secondary Schools.[11] New Jersey costs were estimated at $46 million. However, the author shares the opinion of Dr. John W. Adams, Director, Federal-State Relations, Council of Chief State School Officers, that most of the cost estimates are "...at best, wild guesses derived from single-case studies, extrapolated to a larger audience...."[12] The disabled are becoming increasingly impatient and less tolerant of the current outcry that the requirements of Section 504 are too costly to implement. To quote Ms. Debbie Kaplan, Disability Rights Center: "...Unfortunately, we have seen little evidence of any good faith efforts to accommodate the disabled from those who are protesting the loudest. This makes me suspect that the protests about cost may be a red herring, that the real issue at hand is prejudice against the disabled...."[13]

There are actions underway in the Congress to assist. Representative James Jeffords of Vermont has introduced House Resolution 7626, authorizing $6 billion to carry out the purposes of Section 504 of the Rehabilitation Act of 1973.[14] Senator Jennings Randolph of West Virginia has introduced S. 2302, which would authorize $15 million to

fund studies to assess the costs of compliance with Section 504 with regard to educational programs. Not later than 180 days after enactment, the Secretary of HEW would report to the Congress on the cost of compliance. The bill would authorize federal grants to assist with these costs.[15] Interesting, most organizations of the disabled are not backing such legislation. Rather, they are pressing for completion of estimates of the cost of program accessibility by individual recipients and determination of how much money is available from private sources and from other authorizing legislation.[16] A very prevalent viewpoint in the disabled community was eloquently expressed by Mr. James Gashel of the National Federation of the Blind: "...It is a dangerous and unacceptable precedent to create the principle that civil rights can only be had if funds have been appropriated, for indeed, in most cases, they need not be."[17]

The Carter administration's position on providing funds for program accessibility seems less than enthusiastic. HEW requested $50 million for the removal of barriers under the Higher Education Act; however, no funds were requested under Section 607 of the Education for All Handicapped Children Act. U.S. Commissioner of Education Ernest Boyer said colleges generally present, ..."immediate problems more acute than the elementary school structure arrangement- a single building with a single story."[18] This clouded picture on funding certainly stresses the necessity for the imaginative in our solutions to problems of program accessibility. We must avoid overreaction and prevent wasteful duplication. HEW Secretary Califano has stated that the administration of the Section 504 Regulation"... will be guided by sensitivity,

fairness, and common sense."[19] Our approach should be the same.

METHODS

Recipients may comply with the program access requirements through a variety of methods. The regulation lists a few: redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home methods, delivery of services at alternate sites, and architectural modifications. A recipient is not required to make the architectural modifications if other methods are effective in achieving compliance. Very small health, welfare, and social service providers (those with fewer than fifteen employees) may refer handicapped persons to other providers if significant facility alterations would be required.

The key tool for compliance with this Subpart is the transition plan. The plan outlines each recipient's intentions for the attainment of program accessibility. The plan must include as a minimum:

1. Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

2. Describe in detail the methods that will be used to make the facilities accessible;

3. Specify the schedule for taking the steps necessary to achieve full program accessibility. If the transition period is longer than one year, identify steps that will be taken each year; and

4. Indicate the person responsible for the implementation of the plan.

A requirement of the Subpart with regard to the transition plan, which we simply can not overemphasize, is the involving of disabled

persons and their organizations in plan preparation. The literature is full of examples of overreaction and duplication planned by "experts." One university planned to place audio announcements along with print signs on all of its buildings, because someone argued that since there were signs for the sighted there must be announcements for the blind. This, of course, is nonsense. Some providers are not aware of the services available through the State Division of Vocational Rehabilitation Services or the Commission for the Blind and Visually Impaired. Duplication of services already provided by these agencies is wasteful.[21] Another tendency is to provide services which the handicapped neither need nor desire. The relatively complex system of support services for disabled students set up by the University of Illinois is frequently looked to as a model for compliance. Says Peggy Pinder of the National Federation of the Blind in a letter to Newsweek Magazine, "...the most objectional part of the article, however, was its description of the University of Illinois as a mecca for the handicapped. The University of Illinois has been well known among the blind for years as the bastion of the most limiting stereotypes about us. It is a mecca of custodial, parternalistic, well-intentioned discrimination against the blind."[22] There is great rebellion against what is being termed "the medical model" based on the delivery of "special services" to "care" for "disabled" persons. This is not to say that transition plans should be prepared entirely by disabled persons. Rather, what is needed is a consortium of the disabled and providers. The author definitely does not advocate hiring of outside consultants for preparation of transition plans. In the author's opinion, such action is potentially ineffective

and wasteful. This is not to deny the possible necessity for technical expertise on particular portions of a transition plan, for example, an architect to determine the actual costs involved with a particular proposed modification.

In a subsequent chapter, we will develop a model transition plan. At this time, however, we will discuss the stages in preparation of such a plan:

Stage 1, Announcing the Commitment. The author recommends the first stage be some form of announcement by the Chief Executive Officer of the organization making a commitment to program accessibility. Such an announcement may prove valuable in assuring subordinates of the seriousness of the program and, in appropriate cases, could provide a prelude to fund raising.

Stage 2, Organizing the Team. The second step is the appointment of the official who will be responsible for the preparation and implementation of the transition plan. Normally, the official will require assistance. A team should be carefully selected to include all necessary expertise and, to assure maximum involvement, every facet of the organization. While titles will vary from recipient to recipient, certain functions can be identified, prima facie, as essential. Among them are:

1. Plant Engineering: To provide details about the facilities and current plant operating schedules. Plant Engineering can also speak knowledgeably on capability for integrating accessibility modifications into normal maintenance procedures.

2. Business Office: To assure that necessary budget commitments are made.

3. Development Office: For identification and development of potential sources of funding.

4. Security Office: To arrange for implementation of parking changes and to identify potential problems in mobility between buildings at the recipient's site.

5. Registrar/Admissions/Input: To provide data on anticipated disabled populations to be served.

6. Public Relations: To promote a positive image of the institution and of the disabled as part of the total project.

7. Operations: To provide insight into the functioning of the organization and to assure across-the-board commitment.

8. Disabled People and Consumer Organizations: To bring the consumer viewpoint to the total planning process.

It is essential that individuals be chosen to provide a cross section of disability needs. Those with sight and hearing impairments as well as mobility impairments should be represented. Where appropriate, those with mental handicaps, or their advocates, should also be included.

Stage 3, Identification of Obstacles. Recruiting individuals representative of a variety of disability groups for the survey project can go far in guaranteeing that adequate consideration is paid to the needs created by all types of handicapping conditions. In so far as the survey instrument is concerned, there are many excellent examples available. Two good ones are included as appendices in the booklet "Planning for Accessibility," prepared by the Association of Physical Plant Administrators of Universities and Colleges.[23] Another excellent survey form has been prepared by the University of Georgia at Athens.[24] While neither of these forms is perfectly applicable to New Jersey because of differences in building codes, all are perfectly acceptable for this survey phase. Several key points to consider during this survey are: 1) Include transportation concerns; 2) Include

requirements for special use areas such as dining facilities, dormitories, and recreational space; and 3) Avoid stereotypes: People in wheelchairs play tennis, blind people swim, there are deaf lawyers.

Stage 4, Determination of Methods. The team should now sit down together and formulate the plan of action. Consider a student, patient, or client during a typical day at the facility. What barriers will be encountered? Which of these can be handled easily by means such as rescheduling to accessible facilities? Which can be accomplished by minor redesign of equipment? Which will require the provision of support services, such as readers or interpreters? Can the support services be obtained from an already existing program? Can they be provided by volunteers? Finally, which will require architectural modifications?

Stage 5, Setting the Schedule. It is essential at this stage to levy responsibilities for the accomplishment of necessary administrative steps such as rescheduling of activities into accessible facilities, arranging with outside agencies for support services, and issuance of necessary regulatory documentation. Target dates should be agreed upon. While it is not a requirement of the Section 504 Regulation to include such non-structural arrangements in the transition plan, the author definitely advises such a procedure. The author believes that all changes should be included so that the document gives a complete picture of how program accessiblity will be attained. The transition plan represents a commitment of the institution to program accessibility, thus it will require a system for periodic review and assessment.

GUIDELINES

The author has a few suggestions for the preparation of transition

plans. First, avoid "special solutions." To the degree possible, encourage "mainstreaming." Build a ramp; don't assign people to carry a beneficiary who uses a wheelchair. In the long run, the author believes such solutions are less expensive and they certainly have a more positive psychological effect on the disabled.[25] Second, assure your "imaginative" solutions are within the purview of building codes. The next chapter will cover this subject in great detail. Third, handicapped persons should enjoy the same freedom to make decisions and assess risks as the nondisabled. Mobility limited people routinely live and work on the upper stories of buildings, despite the fact that their evacuation in case of fire would be difficult. Fourth, making facilities program accessible through such means as on-call assistance is at best a poor solution and should not be considered a final response to a problem.

The last requirement of Subpart C, Section 84.22(f), calls for making information on accessible services, activities, and facilities available to all persons, including those with sensory impairments. While not a part of the transition plan, the development of such "Accessibility Guides" can be a natural extension of the process. The Rider College Handbook of Services for Disabled Students is a good example of genre.

DISCUSSION QUESTIONS

1. Many disabled individuals feel that complete accessibility is a civil right. Do you feel that HEW was correct in only requiring program accessibility?

2. Should accessibility be considered a civil right? Should lack of funding be considered an adequate excuse for noncompliance with program accessibility requirements? Should recipients be required to shift funds from other programs to barrier removal?

3. Do you feel disabled persons can really play a valuable part in the formulation of transition plans? Do you think that being disabled makes you an "expert" in providing for the needs of the disabled?

4. Many of the disabled are deploring the so called "medical model" for providing services. They desire to be treated as independent individuals, functioning in the "mainstream" to the degree possible. Is this feasible?

5. Has your agency completed its transition plan? Does it incorporate any clever solutions which might be of value to the group?

6. Are we not placing ourselves in a position of great risk by allowing the disabled to be "mainstreamed?" What if there is a fire and a deaf person can not hear the alarm or a mobility limited person can not escape from an upper floor?

7. Despite extreme care in the planning phases, it is quite likely that providing services for the disabled will be more expensive than providing them for the nondisabled. Who should bear this additional expense?

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CHAPTER IV

BUILDING CODES

Subpart C, Program Accessibility, of the HEW regulation implementing Section 504 of the Rehabilitation Act of 1973 dictates that handicapped persons shall not be denied the benefits of federally supported programs because a recipient's facilities are inaccessible. Section 84.21 covers this general prohibition against architectural discrimination. Section 84.22 covers the concept of program accessibility, under which it is possible to make a program accessible through varying means, both administrative and architectural. The program accessibility concept, predominately, is applicable to existing facilities. The concept and steps to plan for its fruition were covered in Chapter III.

Section 84.23 covers the subject of new construction and will be the focus of this chapter. The thrust of Section 84.23 is contained in 84.23(a) which requires that facilities constructed after the effective date of the Section 504 Regulation be readily accessible to and useable by handicapped persons. In 84.23(b), this same requirment is imposed, to the maximum extent feasible, on alterations. In 84.23(c), the regulation dictates the use of a particular architectural standard for compliance with paragraphs (a) and (b). That standard is ANSI A-117.1-1961 (R1971). The standard is published by the American National Standards Institute, Inc., 1430 Broadway, New York, New York. The standard is entitled "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Useable by, the Physically Handicapped." As the numbering of the standard implies, it is a 1961 document, revised in 1971.

The Section 504 Regulation allows departures from ANSI A-117.1 and use of other standards when "...it is clearly evident that equivalent access to the facility or part of the facility is thereby provided." Such is clearly the case in New Jersey where architectural standards written into state law and administrative code clearly are more stringent than ANSI. Additionally, the scope of New Jersey law and code is very broad, including all but an extremely small number of building situations. This scope is sufficient to make discussion and study of the ANSI standard somewhat moot for New Jersey recipients. Therefore, the remainder of this chapter will concentrate on New Jersey requirments.

On October 8, 1975, Governor Brendan T. Bryne signed into law Chapters 219, 220, 221, and 222, Laws of New Jersey, 1975. Chapters 219, 220, and 221 resulted from Senate Bills S-1251, S-1252, and S-1257, sponsored by Senator Frank Dodd of Essex. Chapter 222 resulted from Assembly Bill A-1622, sponsored by Assemblywoman Gertrude Berman of Monmouth.

Chapter 219 affects public elementary and secondary schools. Prior to its passage, a 1971 law required Boards of Education to incorporate certain design features for the physically handicapped into public school construction. The facilities were listed and included accessible entrances, useable toilet facilities, lowered drinking fountains, and lowered telephones. The State Board of Education interpreted the legislative intent broadly and, by administrative code, dictated use of a somewhat modified version of ANSI A-117.1 for new construction. Chapter 219 deleted the specific requirements and directed the Department of Education to promulgate updated guidelines on making facilities

accessible to and useable by the physically handicapped. The legislation also expanded the scope of the requirement to include not only new construction but, also, large-scale alterations as well.

Chapter 220 also amended a 1971 law, Chapter 269. Prior to its passage, facilities for the physically handicapped were only required in buildings erected by the State or its political subdivisions and then only to the extent deemed feasible by the contracting authority. As with the prior education legislation, a listing of facilities was incorporated which had been broadly interpreted in administrative code to mean compliance with ANSI A-117.1. Chapter 220 radically expanded the scope of the legislation by making it applicable to all public buildings, defined as a building used by the general public. It removed references to specific facilities requirments and directed the Department of the Treasury to promulgate appropriate code. It expanded the scope from new construction, only, to new construction and major alterations.

Chapter 221 concerns parking facilities. It mandates a minimum of one percent of the total number of parking spaces, but not less than two parking spaces, be provided for handicapped persons in an area of the parking facility most accessible and proximate to the building the facility serves. The legislation is applicable to parking facilities under the control of the State, counties and municipalities, and authorities created pursuant to N.J.S.A. 40:11A-1 et. seq.

Chapter 222 covers curb ramps. It mandates that all new intersections contain curb ramps for the mobility limited. It also requires such ramps where existing curbing is being replaced at intersections. Standards for ramps were to be developed by the Department of Transportation, in conjunction with the Commission for the

Blind and Visually Impaired and the Division of Vocational Rehabilitation Services.

ADMINISTRATIVE CODES

The Administrative Code implementing Chapter 219 of the Laws of 1975 is contained in Title 6, Chapter 22A. The Administrative Code implementing Chapter 220 of the Laws of 1975 is contained in Title 17, Chapter 19A. The two codes are essentially identical. It is not feasible in the space provided here to cover either or both in great detail. We will, however, briefly sketch the requirements of N.J.A.C. 17:19A, where appropriate pointing out any significant differences in Title 6.

Title 17, Chapter 19A is divided into seven Subchapters: 1) Purpose, Scope, Enforcement, and Appeals; 2) Definitions and Use Group Classifications; 3) Remodeling, Substantial Repairs, Alterations, and Additions; 4) Site Development; 5) Buildings; 6) Requirements for Residential Occupancy; and 7) Recreation.

Subchapter 1

The purpose of this Chapter of New Jersey Administrative Code is stated: "to make public buildings accessible to, and functional for, the physically handicapped." Its scope is defined as applying to new construction or remodeling of all public buildings with a few exceptions The most significant of these exceptions, for our purposes, are one to four family residences, warehouse storage areas, hazardous occupancies, and historic buildings to the point where making provisions for the handicapped could not be accomplished without major changing of the building's historical character. Responsibility for enforcement of the code rests with municipal building departments and, in the case of

State-owned buildings, with the Division of Buildings and Construction, Department of the Treasury. (Under Title 6 enforcement for public elementary and secondary schools is handled by the Bureau of Facilities Planning, Department of Education.) The code also establishes an appellate level, vested in County Appeals Boards augmented by disabled citizens and, in the case of State buildings, a departmental appeals process within the Division of Buildings and Construction (Title 6 also establishes a departmental review as the appellate level within the Department of Education.) Appellate authorities may grant exceptions to specific requirements of the code, but not to the code in general. Exceptions may be granted on the basis of practical difficulty or extreme hardship. The appellate procedure may also be used to permit the use of methods not covered in the code, but only when it is clearly evident that equivalent facilitation for the physically handicapped is secured. Records of exceptions granted must be maintained by the appellate authorities, open for public inspection. Appeals may be submitted by an owner, his agent, or any aggrieved party. The term "aggrieved party" is not defined either in the code or in subsequent decisions; therefore, it is unclear whether any handicapped person has sufficient status, in law, to be considered an "aggrieved party."

Subchapter 2

This subchapter is primarily technical in nature and need not warrant our attention. It does, however, contain four definitions which are necessary for our continued study. "Barrier-free" is an environment which would permit a handicapped person to operate independently, with

comparative ease, and with little or no assistance. "Minimal Accessibility" is an environment that would afford a handicapped person access with difficulty and the necessity for assistance. These definitions are contrasted; some facilities are required to be barrier-free, others to be minimally accessible. The term "principle entrance" is defined as an entrance frequently used by the general public. This is to preclude any misconception that it must, necessarily, be the front entrance. "Route of Travel" is defined as the path to be traversed by the handicapped from the public sidewalk and/or the parking lot, through a principle entrance, to all major areas of the building. It also includes paths between buildings serviced by the same parking lot. For outdoor areas, such as parks, it includes the paths necessary to participate in activities, to the degree deemed practical by the construction official.

Subchapter 3

Subchapter 3, in practice, is an extended discussion of the scope of the regulation. Chapter 220 of the Laws of 1975 made it mandatory that facilities for the physically handicapped be included during remodeling. The law requires the entire building be made to comply with the code should the value of the remodeling exceed 60% of the assessed value of the building. Should the value of the remodeling be between 30% and 60% of the assessed value, those portions of the building being remodeled are to comply with the code. Under 30%, the code does not apply. Subchapter 3 expands on the law and also changes the system and percentages of valuation. The so-called "physical value" system contained in the Building Officials and Code Administrators (BOCA) Building Code is now utilized in New Jersey more frequently than the assessed value

method.[1] Therefore, Subchapter 3 converts from the assessed value system of the legislation to the more prevalent physical value system. If the costs of the repairs or alterations are greater than 50% of the building's physical value, the entire building must comply with the requirements of the code. If the costs are between 25 and 50%, those portions of the building being repaired or altered must comply. If costs are under 25%, then the code does not apply.

Subchapter 3 also makes clear that additions, that is an extension or increase in floor area or height of a building, are to be considered as new construction. Additionally, whenever facilities which are critical to the handicapped are to be remodeled, the changes must be in accordance with the code. These facilities include entrances, stairs, elevators, and public toilet rooms. (This requirement is waived where it would necessitate alterations of existing load bearing structural members.)

Subchapter 4

This subchapter contains the general guidance that access to all public buildings must be provided by means of grading, ramps, or walks. It further gives specifications for walks and requirements and specifications for parking lots. It requires curb ramps but defers to the design standard promulgated by the Department of Transportation for details.

All walks within the route of travel are to be at least 48 inches wide and have a gradient or slope of no more than 5%. They are to be level from side to side or have a maximum transverse slope of 3/16 inch per foot. Rest areas, at least 5 feet long, are required every 60 feet whenever the gradient is over 3%. Walks must be at the same approximate level as the adjacent grade.

The discussion on parking spaces defers to Chapter 221 with regard to government parking facilities. There, at least 1%, but not less than two, parking spaces are to be provided for handicapped persons. In all other instances, one space is required in parking lots with capacities up to 50, two spaces in lots with capacities from 51 to 200, and 1% in larger lots. Parking spaces for the disabled are to be parallel to a curb or at least 12 feet wide. They are to be paved, approximately level, and marked with the International Symbol of Access plus appropriate wording such as "Disabled Drivers Only."

While not included in this Subchapter, we will summarize here the keypoints of the Department of Transportation promulgation implementing Chapter 224 on curb ramps. The maximum gradient or slope of curb ramps is to be 1 in 12 or approximately 8% in new construction; 1 in 8 or 12% in old construction where conditions preclude the shallower slope. To accommodate blind persons, the curb ramps are to be tangent to, rather than a continuation of, a route of travel. They are also to be finished roughly to assist in identification. The Department of Transportation did not promulgate this standard in the form of administrative code. Rather, it is contained in a letter to all municipalities dated July 30, 1976. The letter states that the standards are published both in compliance with Chapter 224 of the Laws of New Jersey and the U.S. Highway Act.[2]

Subchapter 5

This subchapter contains the majority of the standard giving specifications for ramps, entrances, doors, elevators, toilet rooms, etc. Only a brief overview of the most salient features can be

attempted here. Recipients with requirements for a more detailed presentation may borrow the viedotapes of a two hour presentation on the subject by the author from the office of the Governor's Committee on Employment of the Handicapped.

Each building is to have at least one accessible principle entrance. The entrance may be level with grade or be reached by ramp or walk. If a ramp or walk is used, the last five feet, immediately in front of the door, must be level. Obstacles to entrance, such as the vertical posts frequently seen at supermarkets, are prohibited. If turnstiles are required, an alternate means must be provided for persons using wheelchairs.

All doors in barrier-free environments are to be wide enough to yield a clear passageway of at least 32 inches when opened. At minimally accessible facilities, such as toilets in small shops, the doors, themselves, are to be a minimum of 32 inches in width. Except for fire doors, the push or pull to operate a door is not to exceed 8 pounds. Threshholds are to be avoided; if necessary they should be no higher than 3/4 " and should be beveled with a slope of not more than 45 degrees. Minimum corridor widths are covered; corridors must be at least 60 inches wide if doors swing into them, 42 inches wide if doors do not. (Wider corridors are frequently required for fire safety by other portions of building codes.)

Generally, floors on a single story must be at a common level or connected by ramps. Exceptions are made for such special purposes as security platforms. An exception is also allowed for not more than 10% of the useable area in lobbys, restaurants, cocktail lounges, and theaters.

Specifications for ramps are given. They must be at least 48 inches

wide, have a maximum slope of 1 in 12 or 8%, and have handrails on both sides. A rest area, at least 5 feet long, is required every 30 feet and wherever a ramp changes direction.

The design standards for elevators are very complex and will not be discussed here. With the exceptions enumerated below, every multi-story building shall have at least one elevator accessible to the physically handicapped:

1. Buildings with less than 6,000 square feet on upper floors.
2. Mezzanines less than 10,000 square feet.
3. Two or three story hotels and motels with fewer than 80 units where 4% of the units are accessible and on the first floor.
4. Residential buildings of less than 3 stories.

Whenever public toilet rooms are required by the building code, at least one toilet room for each sex at each floor must be designed barrier-free for use by the physically handicapped. Stalls are to be at least five feet wide and five feet deep. Handrails are required. Arrangement of doors, vestibules, privacy screens, and fixtures must allow for traffic of persons in wheelchairs. Mirrors, paper towel dispensers, electric hand dryers, and the like must be located not more than 40 inches off the floor.

Wherever there is a bank of more than two public telephones, at least one must be designed for use by the physically handicapped. This means that the coin slot shall be no more than 48 inches above the floor, 54 inches if a person in a wheelchair can approach the phone from the side. Additionally, the phone must have an adjustable volume control and

be push-button, wherever that feature is available.

Whenever there is more than one water fountain per floor, at least one must be useable by the handicapped. This means a fountain no higher than 34 inches. Where there is only a single fountain per floor, the standard can be satisfied by installing a cup dispenser.

Some features for deaf and blind persons are incorporated in this Subchapter. Fire alarms must operate audibly and visually. Where room signs or signs identifying routes of travel are provided, they must be raised so they can be "read off" by blind persons, A number of non-mandatory suggestions for design features to assist the blind and visually impaired are included. Architects are advised of the hazards of low hanging signs projecting into corridors. They are advised to use contrasting floor colors to differentiate circulation routes and to differentiate space in front of elevators and ramps. They are warned of the hazards of making stairways and escalators direct continuations of circulation routes.

A section on public assembly areas emphasizes that the disabled should be considered for participation as well as for spectatorship. It also mandates that handicapped seating be an integral part of seating plans and not segregated. A table for the required number of wheelchair spaces is provided; as an example, 2% of the total are required in small gymnasia, 1% in large gymnasia.

Subchapter 6

This subchapter concerns itself with special requirements applicable to apartments, dormitories, and other residential buildings. In very general terms, it states that 4% of all units in a residential building or a multi-dwelling project are to be constructed barrier-free. The

other 96% of the dwelling units are to provide minimal accessibility. The barrier-free dwelling units comply with all sections of the standard and, additionally, have specially designed bathrooms and kitchens. The minimally accessible units comply with the standard, except that doors are allowed to provide a clear opening of 30 inches rather than 32 inches and minimum corridor width is reduced to 36 inches. A minimum bathroom design is included which would allow use by a person confined to a wheelchair, but, not convenience. Grab bars are not required next to water closets but, provisions for their future installation must be included. Grab bars are required in tubs. A minimum size for kitchens is specified and sinks must be so designed that they could be lowered in the future to allow use by a person in a wheelchair. In summary, the 4% barrier-free units are designed to allow full-time occupancy by a person using a wheelchair; the 96% minimally accessible units are designed to allow a person in a wheelchair to assume the status of visitor. Additionally, the 96% units are designed to allow some additional modifications to facilitate future occupancy by wheelchair users. The Subchapter does include two exceptions; 1 1/2 and 2 1/2 story apartment buildings (those with the first floor partially below grade) need not contain any of the barrier-free units; non-elevator serviced residential buildings (those less than three stories) do not require entrance ramps if their first floors are more than 18 inches above grade.

Subchapter 7

This Subchapter is reserved for future guidelines concerning recreational facilities.

APPLICABILITY TO TRANSITION PLANS

The literature on the subject of barrier-free design is very rich. The Architectural and Transportation Barriers Compliance Board, established by Section 502 of the Rehabilitation Act of 1973, recently published an extensive annotated bibliography on the subject.[3] The author advises great caution in utilization of such literature. New Jersey Barrier-Free Design Codes N.J.A.C. 17:19A and 6:22A are both mandatory in nature. Imaginative solutions to access problems must be viewed with a certain caution to assure that code requirements are met. Bear in mind that exceptions from the methods covered in the standards must be requested from the appellate authorities and must provide equal facilitation.

The author believes that, in certain circumstances, it may be advisable to go beyond the requirements of the code. An example is the one accessible principle entrance requirement. This is probably not practical in a large building such as a major academic structure on a college campus. Another thought is the provision of tele-typewriters, TTYs, for deaf persons. A third thought involved provisions for quadraplegics. The New Jersey Barrier-Free Design Code, with regard to the mobility limited, was written primarily with the paralegic in mind. The quadraplegic with limited use of upper extremities, represents approximately 40% of the population of spinal cord injured persons.[4] The quadraplegic would have a great deal of difficulty with exterior doors, particularly under windy conditions. The author, therefore, advocates the use of exterior, power-actuated doors wherever possible. Additionally, many quadraplegics would have difficulty

negotiating the one in twelve ramps allowed by the standards. The author, therefore, advocates the elimination of ramps, if at all possible. If this can not be done, ramp slopes should be kept as shallow as conditions will allow and, preferably, under 5%.

DISCUSSION QUESTIONS

1. Do you feel greater attention should be paid to the needs of blind and deaf persons in the Barrier-Free Design Code? What are your specific recommendations?

2. Do you believe the New Jersey Code represents a reasonable balance of equity between the rights of property owners and the rights of disabled citizens?

3. The Architectural and Transportation Compliance Board was set up under Section 502 of the Rehabilitation Act of 1973 to police incorporation of barrier-free design standards in Federal buildings. Do you think they are doing an appropraite job?

4. The primary responsibility for enforcing the Barrier-Free Design Code rests with local building officials. Do you feel they are willing and able to undertake this task?

5. Disabled persons, including design professionals, were involved in the formulation of New Jersey's Barrier-Free Design Code. Disabled persons are involved on the appellate level. Nevertheless, it is probably essential that disabled persons and their advocates act as "watch dogs" to assure compliance. Do you feel disabled persons understand this?

6. Do you believe that professionals servicing the handicapped should have a working knowledge of barrier-free design? Do you believe they should provide advice and assistance on the subject?

7. A community is building ten low-income housing units in a multi-dwelling project. They plan to have 4% barrier-free units, but concentrate them all in one building. Is this permissible?

8. Where, and under what conditions, should TTY's be provided?

REFERENCES

1. "The BOCA Basic Building Code" (Chicago, Illinois: Building Officials & Code Administrators International, 1975), p. 3.

2. 23 U.S.C. 402.

3. U.S., The Architectural and Transportation Barriers Compliance Board, Annotated Bibliography of Barrier-Free Design Material, (Washington: Government Printing Office, 1978).

4. Roger Meyer, "The Epidemiology of Spinal Cord Injury" (paper read at the National Paraplegic Foundation Convention, June, 1973, Indianapolis, Indiana). Doctor Meyer stressed the approximate nature of his statistics and emphasized the need to conduct further demographic studies on the spinal cord injured population.

CHAPTER V

MODEL TRANSITION PLAN

Under Subpart C, Program Accessibility, of the regulation implementing Section 504 of the Rehabilitation Act of 1973, recipients of federal funds are required to make their programs or activities readily accessible to handicapped persons. This does not mean that every part of every building must be made barrier-free. Rather, recipients are allowed to use a combination of administrative and architectural solutions to assure accessibility of their programs. Some of the administrative solutions suggested are rescheduling of activities to accessible facilities, redesign of equipment, and assignment of aides to beneficiaries.

Should it not be possible to achieve program accessibility entirely through administrative measures, it is necessary that a transition plan be developed, with the assistance of handicapped persons or organizations representing handicapped persons. The plan must be a public document and must include at minimum:

1. Identification of physical obstacles that limit accessibility;
2. Description, in detail, of the methods which will be used to make the facilities accessible;
3. Detailing of the steps necessary to achieve full program accessibility and, if the time period of the plan is longer than one year, identification of the steps which will be taken during each year; and
4. Identification of the person responsible for implementation of the plan.

The author believes there will be very few New Jersey recipients who will not require a transition plan. Additionally, the author

advocates including all steps, administrative and architectural, in the plan. Not only will this, in the author's opinion, assist with the process of plan development, but, also it will facilitate management by delineating both types of action, and their interface, in one document.

Subpart C sets up time lines for attaining program accessibility. The time period for compliance is established in Section 84.22 as within sixty days of the effective date of the regulation, by August 2, 1977, except where structural changes are necessary. Structural changes may be timed-phased over a three year period, that is they must be completed by June 2, 1980. It is emphasized that this three years is not a waiting period, but, rather a time for program accomplishment.

To assist New Jersey recipients with accomplishment of their transition plans, a model plan is included as an attachment to this Chapter.

METROPOLIS WORKSHOP
METROPOLIS, NEW JERSEY

December 1, 1977

TRANSITION PLAN FOR PROGRAM ACCESSIBILITY

1. Statement of Policy. It is the policy of the Metropolis Workshop not to discriminate on the basis of handicap. The Board of Trustees and management of the Workshop realize that it is necessary for our programs, when viewed in their entirety, to be accessible to handicapped persons. The Board of Trustees has, therefore, directed a review of all of the Workshop's programs and activities and an identification of any obstacles precluding full participation by handicapped persons. The board has directed that such steps as necessary be taken to remove these obstacles through either administrative or architectural changes. In all cases, our intention is to promote full participation by handicapped persons, allowing them to function with maximum independence.

2. The Transition Plan Team. By an action of the Board of Trustees on July 2, 1977, Mr. George A. Perry, Deputy Executive Director, was appointed as the responsible official for development and implementation of the Workshop Transition Plan. The board further charged the Deputy Executive Director with forming a team to include representatives from all phases of the Workshop's operations and, also, to include persons with a wide range of disabilities. The following team was formed:

Mr. George A. Perry, Team Chief

Mr. William T. Corbett, Physical Plant Director

Ms. Susan A. George, Sheltered Workshop Operations (Mobility Limited)

Mr. Peter K. Jennings, Work Activity Center Operations

Ms. Janice A. Kelly, Dormitory Supervisor (Hearing Impaired)

Mr. John D. McNulty, Office Manager

Mr. Barry A. Steinborn, Director of Development

Ms. Monica C. Corbett, Comptroller

Ms. Charlene S. Peters, Client (Blind)

Mr. Bunker T. Archibald, Sheltered Workshop Foreman (Mobility Limited)

Doctor Lillian M. Hellforth, Psychologist (Parent of mentally retarded client)

Ms. Bettye T. Fisher, Counselor (Visually Impaired)

3. Survey Techniques. The survey was comprised of two parts, programatic and architectural. For the first part, the team met as a group, analyzed the Workshop's operations, and identified administrative obstacles to full functioning by disabled persons. For the second part, the team was divided into two groups, each with representation of persons with varying disabilities. Each group, independently, conducted an architectural survey of each of the Workshop's facilities. The instrument utilized was the Facility Architectural Accessibility Profile Report, published by the State University Construction Fund of New York.

4. Survey Results. The following are the results of the survey:

a. Administrative problems:

(1) Although the Workshop has deaf clients, it was determined that an administrative problem existed since no employees skilled in Sign Language were available in the Dormitory Unit or in the Work Activity Center.

(2) While there was a TTY available in the administrative office, the office was locked at night and on weekends and was, therefore, not available to Dormitory Unit residents.

(3) It was not possible for blind clients to use the Stamler Press in the Sheltered Workshop since the signal for reverse actuation was visual.

(4) Upon acceptance into any of the Workshop's programs, clients are supplied with a package of written materials including rules of the various programs and the Dormitory Unit, grievance procedures, and descriptive data. No alternate method for assimilating this material was provided for blind clients. Additionally, it was determined that the reading level of the material was too high for many of the mentally retarded clients.

(5) The Dormitory Unit is located in downtown Metropolis, approximately three miles from the main complex. The Workshop's vehicle which is used for transportation between these sites was not accessible to wheelchair users.

b. Archictectural problems:

(1) The Abbott Building is a two-story structure with the Workshop's administrative offices on the first floor and the Work Activity Center on the second floor. The building was not elevator serviced. There were two entrances to the building, each with a single eight inch step.

(2) The Abbott Building has four toilet rooms, one for each sex on each floor. None were found to be accessible. Toilet stall doors and the stalls, themselves, were found to be too narrow. Mirrors and dispensers were too high. Sink faucets were difficult for those with limited hand strength to turn.

(3) The Robert Woodson Memorial Building contains the sheltered workshop operation. It was built in 1972 and incorporates many design features for the physically handicapped. Discrepancies found were the lack of a visual fire alarm system, the pay telephone in the workshop area being mounted with its coin slot 60 inches above the floor, fire extinguishers in the workshop area being mounted too high to be reached by persons using wheelchairs, and signs identifying the Director's office and the counselling area protruding into the corridor at a height where they could be dangerous to blind persons.

(4) The Janice Aker Memorial Building houses the Dormitory Unit for the Workshop. The building is a converted, two-story motel in downtown Metropolis. It is used as part of our deinstitutionalization program for mentally retarded persons. It currently houses 60 clients plus resident staff. In addition, the Workshop's Office Skills Training Program is located there. The building is not elevator serviced which would deny mobility limited clients access to the counselling area located on the second floor.

(5) There was one dormitory room which was designed to accommodate the use of a wheelchair. However, the room is now being used as an office.

(6) The public toilet rooms located on the first floor were used by staff personnel and clients of the Office Skills Training Program. They were not accessible to persons using wheelchairs. The toilet stalls and stall doors were too narrow, mirrors and dispensers were too high, doors were too hard to open, and privacy screens were located too close to the doorway entrance to allow the necessary 90 degree turn for a person using a wheelchair to enter.

(7) The Aker Building has a swimming pool. The pool, however, does not have ramps or lifts to accommodate mobility limited persons.

5. Actions Planned. After completion of the survey, the team met to discuss possible solutions. Representatives from the Board of Trustees attended the meeting. Recommendations from the meeting have since been discussed and approved by the Board of Trustees and now constitute the approved action items of the Workshop's Transition Plan. Action items, agencies responsible for their accomplishment, and target dates are listed below:

A. Regarding administrative obstacles found:

(1) Regarding the lack of employees skilled in Sign Language in the Dormitory Unit and the Work Activity Center, it was determined that an in-service training program would be established. The program will be held in the Abbott Building during August, 1977 using an instructor from Sussex County College.

Currently available in-service training funds will be utilized to defray costs. The initial class will consist of 10 persons; 5 from the Dormitory Unit to assure the capability of having one person skilled in signing on duty at all times; 2 from the Work Activity Center; and one each from the Sheltered Workshop, Office Skills Training Program, and the Business Office to create better coverage. Primary responsibility for overseeing the accomplishment of this training program is given to the Director of Personnel. Target date for full accomplishment is September 1, 1977. The Director of Personnel is also charged with periodically reviewing the requirement for additional in-service training on this subject.

(2) Regarding the use of the TTY at night and on weekends, the Office Manager is to provide the Dormitory Unit Director with a key to the Abbott Building and a copy of the office instruction on the burglar alarm system. The Dormitory Unit Director will institute a system to assure that the key is always available to the Dormitory Unit Supervisor-in-Charge. The Director will write an instruction concerning availability of the key, procedures with the burglar alarm system, and use of the TTY by deaf clients. In general, deaf clients will be allowed use of the Workshop's TTY at night and on weekends for emergencies. Additionally, they will be allowed to use it, at their own expense, for social purposes, if it is possible to provide adequate supervision. (Clients will not be allowed in the Abbott Building unsupervised during non-business hours.) Primary responsibility for this action item rests with the Office Manager and the Dormitory Unit Director. Target date for completion is August 1, 1977.

(3) Concerning the Stamler Press in the Sheltered Workshop, both an audible and a visual signal will be provided on the machine. This will be accomplished by Sheltered Workshop Supervisory personnel at an estimated cost of $25.00. Currently available operating funds in the Sheltered Workshop will be used. Primary responsibility for this action item rests with the Sheltered Workshop Director. Target date for accomplishment is August 1, 1977.

(4) Regarding the lack of orientation material in suitable form for blind clients, it was determined to prepare cassette tape readings of the material. Twelve such cassettes will be made initially; the need for replenishment will be assessed periodically. Although it is acknowledged that some of the material may be too complex for certain mentally retarded clients, no

republishing is planned. Rather, the initial orientation checklists for new clients will be expanded to assure that all information in the printed material is explained as necessary. Responsibility for producing the taped cassettes of the orientation material is given to the Office Manager. Responsibility for reviewing and expanding orientation checklists as required is given to directors of the Sheltered Workshop, Work Activity Center, Office Skills Training Program, and Dormitory Unit. Target date for completion is August 1, 1977.

(5) Regarding the fact that the Workshop's vehicle will not accommodate persons using wheelchairs, it was noted that the vehicle was given to the Workshop by the State Department of Transportation under Title XVI of the Urban Mass Transportation Act. The workshop will be requesting, and should be receiving, a new vehicle in 1978. It was determined that our request for the vehicle, due at the Department of Transportation on February 1, 1978, would include a requirement for a lift device. The request will stress the Workshop's recognition of its responsibility to provide service to mobility limited clients. Responsibility for this action item is delegated to the Director of the Dormitory Unit. Target date for preparing the required requests is February 1, 1977; target date for acquiring a new vehicle with lift mechanisms is October 1, 1978.

Actions Regarding Architectural Obstacles:

(1) Concerning the entrances to the Abbott Building, it was determined to convert three standard width parking spaces near the rear entrance of the building to two, extra-wide parking spaces for the handicapped. Reserved parking signs will be procured displaying the International Symbol of Access. These spaces are proximate both to the rear of the Abbott Building and the front of the Woodson Memorial Building and should effectively service both facilities. (The total size of the lot is 40 spaces.) A five foot square level platform and an 8 foot ramp will be built of wood at the back entrance by physical plant personnel. Non-skid strips will be affixed. Cost is estimated at $150.00 which will be taken from funds currently available to the Physical Plant Department. The Physical Plant Department will include a line item in its 1978 budget proposal for $1,500 to construct a new platform and ramp at the rear entrance to the building. The platform and

ramp will be constructed of concrete, will have hand rails, and will meet all specifications of N.J.A.C. Responsibility for this action item lies with the Physical Plant Department Director. Target date for establishing and marking the reserved parking spaces and constructing the temporary ramp is September 1, 1977. Target date for the permanent, concrete ramp is September 1, 1978.

(2) Regarding the inaccessibility of the second floor of the Abbott Building, various methods of redistributing space in the complex were discussed as possible solutions. However, in the end, it was determined that an elevator is the only feasible solution. Such elevator cannot be placed within the building without major program disruption and loss of valuable space. Therefore, an exoskeletal elevator was decided upon. The Physical Plant Department estimates cost, for budgeting purposes, at $60,000. Because of this magnitude, it was determined to schedule the elevator for 1980. In the interim, the Director of Development is charged with investigating possible grant or foundation funding sources. The Physical Plant Department Director is charged with inserting a line item in the 1979 budget for $4,000 to be used for architect's fees. The Director of the Work Activity Center is charged with investigating possible agency funding for the elevator in view of our future capability to accept mobility limited clients.

(3) Regarding the toilet rooms in the Abbott Building it was determined to do interim modification to those on the first floor in 1978, permanent modification on the first floor in 1979, and permanent modifications on the second floor in 1980. The second floor modifications will coincide with the construction of the elevator. The 1979 modifications will be done in house. They will include the installation of a longer mirror at one sink location in each toilet room; the installation of new faucets with lever handles at that sink location; the installation of grab bars in one toilet stall in each toilet room; and the removal of the stall door and door stile from the stall with the grab bars. The door will be replaced with a curtain. The cost for this project is estimated at $300.00. The Physical Plant Department will insert an appropriate line item in the 1978 budget. In 1979, the first floor toilet rooms will be permanently modified. Two existing toilet stalls will be made into one extra-wide stall. An extra-wide stall door will be provided. This work will be done by contract;

its cost is estimated at $1,000. The Physical Plant Department will insert an appropriate line item in the 1979 budget. In 1980, modifications to bring the upstairs toilet rooms to the same configuration as those on the first floor will be accomplished. Work will be done by contract; cost is estimated at $2,000. Primary responsibility for this action item rests with the Physical Plant Department Director. Target dates for accomplishment are as follows: 1) Completion of temporary modifications to first floor toilet rooms by September 1, 1978; 2) Completion of permanent modifications to first floor toilet rooms by September 1, 1979; and 3) Completion of permanent modification to second floor toilet rooms by June 1, 1980.

(4) In the Woodson Memorial Building, the Physical Plant Department will remove protruding signs and reinstall them on the appropriate interior doors. Fire extinguishers will be lowered to a maximum of 48 inches above the floor. The Telephone Company will be requested to lower one pay telephone so that its coin slot is no higher than 54 inches above the floor. (All telephones are located so that a person using a wheelchair can approach them from the side.) Target date for completion of the above work is August 1, 1977. The building fire alarm system is on contractual maintenance and, therefore, in-house modification is not possible. A contract will be let with the fire alarm maintenance company to install five strobe light indicators slaved to the system. Two will be located in the main Sheltered Workshop area, one in the materials storage area, and two in the main hallway. Cost is estimated at $500.00. The Physical Plant Department Director will insert an appropriate line item in the 1979 budget; target date for completion is October 1, 1979. In the interim, the Sheltered Workshop Director will modify the Fire Evacuation Plan to assure that supervisory personnel check all areas for deaf clients during evacuation. Target date for modification of the system and testing during one fire drill is August 1, 1977.

(5) Concerning the Aker Memorial Building the necessity for access to the second floor was discussed. It was determined to be more practical to move the counselling areas from the second floor to the first, rather than install an elevator. The only requirement will be movement of furniture. Rooms 213 and 215 will become clients' sleeping rooms; Rooms 121 and 123 will house the counselling area. Responsibility for this action item rests with the Dormitory Unit Director. Target date for completion is August 1, 1977.

(6) To allow for possible accommodation of a client who uses a wheelchair, Room 103 will be converted to a client's sleeping room. The office operation will be moved to Room 119. Responsibility for accomplishing this action item rests with the Dormitory Unit Director. Target for completion is August 1, 1977. In addition, the Dormitory Unit Director will inform sponsor agencies of this capability. Should a client who uses a wheelchair be obtained, transportation to and from the Abbott-Woodson complex will be accomplished by private vehicle of a selected employee at the Workshop's expense. This procedure will remain in effect until an accessible vehicle is obtained.

(7) Work on the public rest rooms at Aker will be phased between 1978 and 1979. During 1978, the Physical Plant Department will remove one sink in each of the rest rooms, relocate the privacy stalls so that they are at least 60 inches back from the in-swinging rest room doors, install long mirrors at one sink location, remove faucets at one sink location and replace them with lever types, install grab bars in one stall of each rest room, and provide a wider opening into that stall by removing the door and stile and replacing it with a curtain. Additionally, dispensers will be lowered and door closers adjusted to assure eight pounds maximum pressure. Cost is estimated at $400.00. The Physical Plant Department Director will insert an appropriate line item in the 1978 budget. Target date for completion of this work is October 1, 1978; minor portions of the work will be accomplished during routine maintenance to the degree feasible. In 1979, permanent modifications will be made by contract. Specifications are parallel to those envisioned for the first floor rest rooms at Abbott; we assume they will be accomplished under the same contract. Cost is estimated at $1,000. The Physical Plant Department Director will insert an appropriate line item in the 1979 budget. Target date for completion is October 1, 1979. The Director of the Office Skills Program is charged with informing sponsor agencies of our proposed expanded capability. Attempts will be made to procure clients due to this capability and, also, to investigate possible agency support in funding.

(8) The subject of the pool at Abbott was discussed. It was determined not to program any modifications or equipment. Current Dormitory Unit rules preclude use of the pool unless a supervisor is present. That supervisor will be expected to provide, or to supervise the provision of, assistance to any client who requires it. By August 1, 1977, the Dormitory Unit Director will include such instructions in the procedures concerning pool use.

6. Oversight. Management surveillance of the Transition Plan is essential to its success. Therefore, the Comptroller will prepare a series of Pert for Ghant charts outlining milestones. The Comptroller will report to the Deputy Executive Director on the status of accomplishment of these milestones within five days of the occurrence of each. The Executive Director or the Deputy Executive Director will report on progress to the Board of Trustees on a quarterly basis. Reports will include an assessment by the Director of Development on the possibilities of outside funding.

7. This Transition Plan is considered a public document. It will be kept available for public review in the Workshop's business office during normal business hours.

Clark S. Kent
Executive Director

DISCUSSION QUESTIONS

1. Is the system for providing TTYs accessible to Dormitory Unit clients at night and on weekends satisfactory? Assuming there are one or more deaf clients, should the Workshop be required to install a TTY in the Dormitory Unit proper?

2. Suppose the Workshop is unable to obtain a Title XVI vehicle with a lift. Do you feel the workshop should be required to procure one at its own expense?

3. Do you feel that two reserved parking spaces at the Abbott-Woodson complex are sufficient?

4. Do you feel that action should be taken to make the front entrance as well as the back entrance to the Abbott Building accessible?

5. Do you detect any flaws in the planning for the temporary ramp at Abbott? Does it meet the requirements delineated in Chapter IV?

6. Is one accessible sleeping room at the Dormitory Unit enough? If not, would you suggest a new figure?

7. Do you believe it is resonable to require the Metropolis Workshop to install an elevator in the Abbott Building? Do you feel the Board of Trustees would be acting reasonably if they determined such an expenditure would constitute undue hardship? For your information, the Workshop has approximately 200 clients, 75 employees, and an annual budget of approximately 2 million dollars. It receives approximately 50% of its income from governmental sources, 50% from private contributions.

8. Do you feel it would be appropriate for the Metropolis Workshop to limit its clientele to those who are mentally retarded or emotionally disturbed? Could they not reasonably fulfill their requirments under Section 504 by referring physically handicapped clients to accessible facilities?

CHAPTER VI

EMPLOYMENT PRACTICES

Sections 84.11 through 84.14 constitute Subpart B, Employment Practices, of the Department of Health, Education, and Welfare's regulation implementing Section 504 of the Rehabilitation Act of 1973. The Subpart begins with a general overview statement: "No qualified handicapped persons shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies." Recipients must make all decisions concerning employment in a non-discriminatory matter. Every aspect of the employer-employee relationship is covered: hiring, promotion, tenure, transfer, job assignment, vacations, training opportunities, fringe benefits, etc. Employers are expected to follow a standard of reasonable accommodation to the known physical or mental limitations of handicapped persons unless it can be shown that doing so would impose undue hardship. The regulation requires that employment testing measures job performance rather than being indicative of an individual's handicap. Lastly, the regulation states that pre-employment physical examinations cannot be required and pre-employment inquiries cannot be made about a person's handicapping condition, although employers may ask about an applicant's ability to perform job-related functions.

A review of the literature indicates a rather enigmatic set of circumstances exist regarding employment of the disabled. First, disabled people definitely want to work, possibly more strongly than their nondisabled peers. Second, disabled persons, placed in the

right positions, are effective, reliable, and productive workers. Third, unemployment rates among disabled persons, particularly the severely disabled, are significantly higher than among the nondisabled. To obtain background for analysis of Subpart B, we will examine each of these three statements.

Olshansky states that work is necessary if one is to function as an adult; to achieve financial independence, a sense of competence, and a feeling of self-respect. But to the disabled, the role of work takes on an added and special meaning; it represents a road to normalcy. Feelings of independence in the work environment compensate for being dependent on other occasions. Moreover, work provides the disabled individual with an identity; without work the disability often becomes the individual's identity. Finally, work provides needed opportunities for socialization and a major source of leisure time activities.[1] Thus, it is not suprising that the disabled view equal employment opportunity as a major goal. In each of the seven meetings which constituted the New Jersey Conference on Handicapped Individuals, delegates passed strong resolutions calling for measures to increase the employment of the disabled.[2] On a national level, similar recommendations were stressed in the Final Report of the White House Conference on Handicapped Individuals.[3] This is not to oversimplify a complex situation. Obviously, there are a number of disabled persons for whom employment is not a reasonable goal, who should be allowed and assisted to live with dignity and independence integrated to the degree possible in community life.[4] Nonetheless it is clear that the disabled consider themselves an underemployed segment of our population and feel that this situation can, and must, improve.[5]

The literature abounds with studies concerning the success of properly placed disabled workers. A longitudinal study of 14,000 disabled workers at DuPont showed high job safety performance compared to their able-bodied peers and a much lower rate of job turnover. A study by Prentice-Hall of 50 companies found handicapped workers, as a group, superior to able-bodied workers in absenteeism, punctuality, safety, turnover, dependability, and morale.[6] In a recent article, the highly respected Harvard Business Review thoroughly analyzed the normal myths concerning hiring the disabled and fully debunked them.[7]

Despite the fact that disabled persons as a group desire to work and the fact that they make good, dependable workers, employment statistics for the disabled are abyssmally low. Three-fifths of the adult, able-bodied population is employed; only two-fifths of the disabled are employed. To break this down by sex, 75% of nonhandicapped men are employed; 60% of handicapped men. Among women, 54% of the non-handicapped are employed; 29% of the handicapped. Among severely disabled men, the chance of being employed at all is about one in five, one in seven of being employed full-time. The severely disabled woman has only about one chance in ten of gainful employment. The mean earnings of the employed disabled are approximately seven tenths of their able-bodied peers[8] Most surprisingly, employment statistics are not improving despite massive educational campaigns by the federal government and the new civil rights movement among the disabled, themselves. In 1966, 55% of the handicapped considered themselves unable to work regularly; by 1972 this had risen to 69%.[9]

What are the reasons for this seemingly contradictory situation? Braunstein recognizes the "...expanded view of the fruits of labor..." held by the disabled but feels that incentives for work are undermined by current structures of the Social Security and Medicaid programs.[10] The economic and medical fringe benefits of these programs, as currently designed and administered, seem to encourage continued dependency rather than moving the disabled toward employment. For a person receiving Supplemental Security Income, any salary earned above $65.00 per month will cause a $1.00 loss of benefits for every $2.00 earned. Social Security Disability Insurance can be cut off to any individual who earns more than $200.00 per month. Loss of SSDI can also result in loss of Medicaid benefits. The implications for individuals living in nursing homes or having high medical care costs are obvious. In a highly perceptive article, Hillam states that American society does not expect or require the handicapped to work.[11] There appears to be a societal tendency to relegate the disabled to nonproductive roles, feeling it more appropriate to support the disabled through charitable or welfare schemes as opposed to considering them potentially productive members of society. Wacker reports a continuing tendency for employers to view one class of disabled persons, the blind, as "...a pathetically fragile, idle group incapable of competitive employment...."[12] He also notes the tendency of employers to feel that monetary gifts to charitable organizations substitute for the requirement to place disabled persons on the payroll.[13] Additionally, in a sluggish labor market, employers are not motivated toward employing persons who just might cost them money for reasonable accommodation or time for modifying their traditional

workplace practices.[14] These dual aspects of preconceived notions of unemployability and resistance to change of traditional practices are operative within the professions as well as industry. Dolan noted that over one-half of the professionally employed persons in the State of New Jersey were in the profession of teaching. Nevertheless, under one percent of the employed teachers in the State were handicapped.[15] For many years, states such as New Jersey, New York, and Illinois had administrative code severely limiting the licensure of handicapped persons as teachers. It was not until the advent of the civil rights movement among the disabled in the late 1960's and early 1970's that such practices were ruled discriminatory by the courts and ended.[16]

To conclude our background discussion, the cost of the high unemployment rate among the disabled should be noted. In Fiscal Year 1977, income transfers to the disabled exceeded 20 billion dollars. This represents a tripling of expenditures compared with Fiscal Year 1966. During this same period, the number of recipients increased by 66%.[17] These sharply rising expenditures are causing considerable concern in the Congress. Significant increases were enacted in Social Security taxes in 1977 to keep the Disability Fund solvent until 2005. Some members of Congress, however, feel that the new taxes will be insufficient considering current growth tendencies. Some critics believe that the structure of the benefits program is causing a degradation of the traditional strong desire of disabled persons to work. Says Senator Russel B. Long, Chairman of the Senate Finance Committee, "The program is out of control...We've made it so attractive that it pays for people to persuade themselves they are sick."[18] Contrasted with

this viewpoint is the general feeling of the disabled community that benefits are too low to allow for a decent standard of living.[19]

Thus, in summary, we have the following parameters entering the equation: 1) Disabled people have, for a variety of sociological reasons, an above average desire for work; 2) Disabled persons make fine employees; the conventional "myths" concerning their problems in employment situations have essentially no validity; 3) Employers still are not willing to open up job opportunities to the disabled due to perceived costs of accommodation and adherence to the societal image of the disabled as helpless; 4) Employment rates for the disabled are abyssmally low; and 5) Costs for governmental benefits for the disabled are rising sharply causing dissatisfaction both among the disabled and in the Congress. In the author's opinion, such a situation is ripe for government intervention. Such intervention is prevalant in other countries; for example, in England, there is a quota system for hiring the severely disabled in industry.[20] However, our tolerance for governmental intervention in the labor market is not as high as in other countries and, therefore, less drastic measures were appropriate.[21] Section 504 offers the carrot and stick approach. It mandates equal employment opportunities for the disabled, hence satisfying their desire for employment and cutting back the costs of disability benefits, in agencies which receive the carrot of Federal assistance.

Subpart B is remarkably simple, only four paragraphs, Sections 84.11 to 84.14. Section 84.11 forbids a recipient from making any decision in the whole spectrum of the employment relationship which discriminates on the basis of handicap. It covers all aspects from

recruiting to hiring to promotions and conditions of employment to retirement. Collective bargaining agreements provide no excuse for noncompliance. A recipient may not enter into any contractural relationship which subjects handicapped applicants or employees to discrimination.

Section 84.12, Reasonable Accommodation, probably has caused more worry and confusion than any other portion of this Subpart. In general, this Section requires a recipient to make "reasonable accommodation" to the physical and mental limitations of handicapped employees or job applicants, unless it can be shown that the accommodations would impose an "undue hardship." Some examples of "reasonable accommodation" in the employment environment follow:

1. Making the building or job site accessible by removing architectural barriers, ramping stairs, making restroom facilities useable, etc.

2. Restructuring or redesigning the job to meet the needs of the physically or mentally disabled person. This may mean shifting duties and activities in a manner which will enable a person with disabilities to perform the duties essential to the job without having to perform other duties which could easily be done by someone else.

3. Providing for the special communication needs of sensorally impaired persons. Examples might include devices which allow the blind to read regular print, the hearing impaired to use the telephone, a one-armed person to type.

4. Modifications to the job site; installing a special jig to guide a blind assembly line worker; putting a light over a deaf worker's bench to signal a fire drill has been called; a braille terminal on a computer.

The question of "reasonable accommodation" is a gray area. How reasonable is reasonable? In making such decisions, the Office for Civil Rights will compare the nature and cost of the accommodation needed to such factors as the size of the recipient's program, the number of employees, and the size of the budget. There is very little data available upon which to quantify the decision making process. The commentary accompanying the promulgation of the Section 504 Regulation states: "Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, but it would consitute an undue hardship to impose that requirement on a small provider of foster home care services."[22] Should a recipient face the necessity for deciding whether an accommodation is reasonable, the author suggests several factors be taken into consideration. First, assistance is often available from the Division of Vocational Rehabilitation Services or the Commission for the Blind and Visually Impaired. These agencies can often defray the cost of special aids or might be able to provide accommodation expertise. The employee or applicant may also be an excellent source of information on affecting such accommodation. Second, the decision on whether to make an accommodation to a disabled applicant or worker should be reserved to a management level fully cognizant of possible ramifications.

Section 503 of the Rehabilitation Act of 1973 requires Federal contractors to establish programs of "Affirmative Action" for hiring the handicapped. Some of the principals of "Affirmative Action" would be very valuable to recipients in assuring their capabilities to meet the "reasonable accommodation" requirements of Section 504. Some of these program principles are listed below:

> Analyze position descriptions to be sure they accurately reflect the jobs they describe and that accompanying worker specifications do not contain physical and mental ability requirements which pose unnecessary barriers to handicapped people.
>
> Look over the selection process to be sure that handicapped people are not just considered for certain stereotyped kinds of jobs with limited duties and limited growth potential.
>
> Use internal communications to build acceptance of handicapped people by managers, supervisors, and employees.
>
> Carefully orient personnel people on the requirments of "reasonable accommodation."

Section 84.13 covers tests and employment selection criteria. It states that recipients may not use tests or other selection criteria that screen out handicapped persons, unless the tests relate to the particular job in question. Alternative tests which are less discriminatory may be recommended by the Office for Civil Rights. Tests must measure job performance rather than the individual's ability to see, hear, speak, or perform manual tasks, unless such skills are essential to the job. For example, an applicant for a job who has a substantial hearing loss would be severely disadvantaged if given an oral test. The results would measure hearing loss rather than the ability to perform on the job.

Section 84.14 concerns pre-employment inquiries. An employer may not ask a prospective employee whether he or she is handicapped. Such a question may be placed on an application, for voluntary completion by an applicant, to comply with Section 503 of the Rehabilitation Act or in conjunction with voluntary affirmative action programs. A sample question might read: "If you have a handicap and would like to be considered under our affirmative action program, please tell us. Supplying this information is voluntary. If it is provided, it will be kept confidential, except that: 1) supervisors and managers may be informed regarding work restrictions or accommodations, and 2) first aid people will be informed regarding possible emergency treatment."

While a direct question concerning handicap is prohibited, an employer may inquire into an applicant's ability to perform job-related tasks. For example, an employer may not ask if an applicant is visually impaired, but may ask if a person has a driver's license.

The regulations do not preclude pre-employment medical examinations. Offers of employment to handicapped persons may be conditioned on the results of such examinations. However, such examinations must be administered to all entering employees, the results must be used in a nondiscriminatory manner, and the examination records must be treated confidentially. Results may only be released to supervisors and managers for the purpose of planning necessary accommodations on the job site or to first aid personnel should the condition require emergency medical treatment.

INTERFACE WITH OTHER PROGRAMS

In addition to Subpart B, Employment Practices, of the Section 504 Regulation, many employers in our target group also must comply with other regulations on the subject of hiring disabled individuals. These include Section 503 of the Rehabilitation Act of 1973, the New Jersey Law Against Discrimination,(N.J.S.A. 10:5-1 et seq.), and the affirmative action requirements of Public Law 94-142, The Education for All Handicapped Children Act. We will begin with Section 503.

Section 503

Section 503 requires every employer doing business with the Federal Government, with a contract for more than $2,500, to take "affirmative action" to hire handicapped people. "Affirmative action" also applies to job assignments, promotions, training, transfers, working conditions, terminations, and the like. The definition of "handicapped person" for the purposes of Section 503 is the same as that previously discussed for Section 504. Contracts included are those over $2,500 dollars for supplies, services, the use of real or personal property, or construction.

Each contractor must include an "affirmative action" clause in each of its contracts or subcontracts. The clause must cover these points:

1. The contractor agrees not to discriminate against any handicapped person who is qualified to perform the job and also agrees to take affirmative action to hire, advance, and treat handicapped people without discrimination,

2. The contractor agrees to abide by all Department of Labor rules and regulations concerning employment of the handicapped and affirmative action,

3. In the event of noncompliance, the contractor understands that he or she will be declared in default,

4. The contractor agrees to post notices of affirmative action in conspicuous places around the establishment,

5. The contractor agrees to notify all union or worker representatives that the establishment is covered by the affirmative action law, and

6. The contractor will include the affirmative action clause in all subcontracts or purchase orders of more than $2,500.[23]

What is "affirmative action"? It is a step beyond non-discrimination; it is a positive attempt to increase the number of disabled workers a contractor hires and to assure their normal progression through the hierachy of the organization. The Section 503 Regulation divides affirmative action requirements into five categories: 1) Administrative; 2) Review of job qualifications; 3) Reasonable accommodation; 4) Pay; and 5) Outreach.

Administrative. An executive of the establishment is to be appointed director of affirmative action activities. The director's duties should include policy and program development; arranging for audit and reporting systems; serving as liaison with enforcement agencies and organizations of handicapped people; keeping management informed of developments in affirmative action; and arranging career counselling for handicapped employees. Additional administrative requirments include the posting of affirmative action notices and the notification of unions and workers of coverage by Section 503. Larger contractors, those holding a contract or subcontract of $50,000 or more and having at least 50 employees, are required to have an Affirmative Action Plan, reviewed and updated each year, setting forth policies and practices regarding handicapped employees.

Job Qualifications. Contractors are required to review their personnel processes to determine whether they assure fair consideration for the hiring or promotion of handicapped persons. Contractors must also set up, and adhere to, a schedule for the review of physical or mental requirments for jobs to see whether such requirements screen out handicapped people. If they do, the requirements must be reviewed and shown to be clearly job-related and consistent with business necessity or safe practice.

Reasonable Accommodations. A contractor must make reasonable accommodations to the physical and mental limitations of handicapped employees or job applicants, unless the contractor can show the accommodations would create an undue hardship on the business. The reasonable accommodation portion of Section 503 is essentially identical to that of 504 except that undue hardship is defined in the context of a business atmosphere. To quote from Section 60-741.6 of the Section 503 Regulation, "...In determining the extent of a contractor's accommodation upon obligations, the following factors among others may be considered: (1) business necessity and (2) financial cost and expenses...."

Pay. Handicapped persons may not have their pay reduced because of any outside disability pension or compensation or payments they may be receiving from any other source.

Outreach. Outreach is the heart of the affirmative action program since it is what distinguishes between affirmative action and non-discrimination. The Section 503 Regulation does not mandate specific outreach requirements but rather lists some general types of activities and allows contractors to tailor programs to their specific requirements.

Some of the suggested outreach elements are:

1. Hold briefing sessions for recruiting sources to let them know about company plans and policies, job prospects, in terms of handicapped workers;

2. Take part in job fairs, recruiting programs in schools, and other activities that reach handicapped persons;

3. Building acceptance of handicapped people by managers, supervisors, and all employees through internal communications;

4. Reviewing employment records of handicapped persons to find out whether their full abilities are being used,

5. Getting advice on placement, recruiting, training, and accommodations from vocational rehabilitation, voluntary health agencies, handicapped groups, and others; and

6. Use of recruiting sources such as state employment services, vocational rehabilitation, sheltered workshops, college placement offices, state education agencies, labor organizations, and organizations of handicapped people.[24]

Responsibility for enforcing Section 503 rests with the Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor. This office also has responsibility for enforcement of Section 402 of the Vietnam Era Veteran's Readjustment Act and Executive Order 11246. This Executive Order has the same relationship to the Civil Rights Act of 1964 as Section 503 of the Rehabilitation Act has to Section 504; Title VI and Section 504 are concerned with nondiscrimination, the Executive Order and Section 503 impose further affirmative action requirements. OFCCP's programs involve surveillance of some 29,000 contractors, employing an estimated 31 million workers. In 1977, OFCCP had 19,000 positions and a budget of approximately 42 million dollars.[25]

There are two major means used by the federal executive agencies for enforcement; compliance reviews and complaint investigations. To date, OFCCP has used compliance reviews as its principal form for enforcement of Executive Order 11246, with its 503 program geared primarily to complaint investigations. Minimum compliance review responsibility has been delegated to federal contracting agencies while they are conducting pre-award reviews. These responsibilities include:

1. Distributing Section 503 and its implementing regulation to the contractors;

2. Determining whether contractors having Federal contracts of $50,000 or more and 50 or more employees have a written affirmative action plan that relates to hiring and promoting qualified handicapped persons; and

3. Determining whether the contractor has an updated "Equal Employment Opportunity is the Law" poster, dated October 1976, displayed at its facility.[26]

Since the program is complaint oriented, there is little opportunity to identify and remedy systemic discrimination or to take on cases with broad applicability for precedent setting. The Department of Labor defines systemic discrimination as "consisting...of mental and physical requirements for jobs which (a) have been in existence so long they are accepted without thinking about them; (b) are not really related to the specific job; (c) screen out many handicapped people who could fill the job is they were given a chance."[27]

Recognizing this problem, the Department of Labor, in a meeting held on January 11, 1976, announced its intention to hold 300 directed compliance reviews, 30 in each of the ten regional offices. In the words of Harold Russel, Chairman of the President's Committee on Employment of the Handicapped, "a new direction is emerging in affirmative action."[28]

Two statements from the report of the meeting are indicative of this new direction. The first is from Ray C. Marshall, Secretary of Labor:

> We have tried to emphasize the importance of anti-discrimination activities in our overall employment policies...We are not likely to move this country toward full employment unless we have an effective anti-discrimination program. We can not make full use of the productive capabilities of people if they are discriminated against for reasons not related to their abilities to produce.

The second quote is from Weldo Rougeau, Director of the Office of Federal Contract Compliance Programs, Department of Labor:

> One of the reasons for directed compliance reviews is that we can go into a company and look at an entire range of programs that affect the opportunities of handicapped people. We can deal with the employer on all these problems, and not with just a scattered few of the problems. Directed compliance reviews should result in more efficient and effective enforcement.[30]

The New Jersey Law Against Discrimination

Since 1945, New Jersey has had legislation against discrimination. In 1972, prohibition against discrimination on the basis of physical handicap was added to the law. The full text of the law is contained in N.J.S.A. 10:5-1 et seq. Responsibility for enforcement of the law is vested in the Division on Civil Rights, Department of Law and Public Safety. The Division has published implementing guidance in N.J.A.C. 13:4-1 et. seq. Particular sections of interest are definitions in Part 10:5.5, the physical handicap amendment in Part 10:5-4.1, and the employment discrimination section in Part 10:5-12.

"Physical Handicap" means any physical disability, infirmity, malformation or disfigurment which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be

limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impairment, muteness or speech impediment, or physical reliance on a seeing eye dog, wheelchair or other remedial appliance or device. By comparison, this definition is far narrower than the definition for Section 504. It is limited to the "traditional" concept of handicap and does not include mental illness, mental retardation, learning disabilities, alcoholics or drug addicts, or those who are not handicapped but are regarded as such.

The physical handicap amendment contained in Part 10:5-4.1, states that "All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because of the physical handicap of such person or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment."

The unlawful employment practices portion of the law, as qualified in Part 10:5-12, states that it shall be unlawful for : "(a) any employer...to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment... (b) a labor organization...to exclude or to expel from its membership such individual...(c) any person to take reprisals against an individual because he is opposed to any practices or acts forbidden under this act or because he has filed a complaint, testified, or assisted in any

proceedings under this act." This section is broadly parallel to the employment practices portion of the Section 504 Regulation, Subpart B. Note that it does not require Affirmative Action. Note also that it applies to all employers in the State of New Jersey not just those who are contractors or grantees of the State.

In its Administrative Code implementing the law, the Division on Civil Rights has included certain requirements of interest to our study. First, it requires the posting of a notice in a conspicuous location on the New Jersey Law Against Discrimination. Copies are available on request from the Division. The poster also fulfills requirements for notice contained in Title VII of the Civil Rights Act of 1964. Second, the Division has set up rules relating to pre-employment inquiries. Employers are prohibited from making any inquiry into an applicant's physical condition until after making an offer of employment, unless such a question relates directly to physical capability to perform a specific job. Here, New Jersey's requirement is parallel to Section 504. Third, New Jersey Administration Code forbids employers from requiring applicants to take physical examinations before hiring.[32] Employers, however, may condition hiring upon the successful passing of a physical examination, whose portions have direct bearing on the satisfactory performance of the specific job in question, provided such an examination is given to all persons, not just those who are handicapped. In this area, New Jersey's requirements are essentially parallel to Section 504. Fourth, the Division requires that testing not discriminate against a handicapped and must be related to the ability

to perform the work for which the testing is made. The Division will examine such tests in light of Griggs v. Duke Power Company.[33] and Albermarle v. Moody.[34] These decisions said, in essence, that if examinations tend to screen out minority groups, whether intentionally or unintentionally, they are unlawfully discriminatory. A test must be designed to test only the applicant's capability in relation to the job. Even if employers can show that a discriminatory test is job related, they may be required to show that no other less discriminatory test is available. In this area, New Jersey's Law is parallel to Section 504, which also bases its testing requirements on the Griggs and Albermarle decisions.

We will not cover enforcement procedures for the New Jersey Law in any detail. In general, any person claiming to be aggrieved can file a complaint with the Division on Civil Rights. The Division will attempt to solve the problem through conciliation and has the right to establish affirmative action programs should a pattern of discrimination be found. Decisions of the Division are ultimately enforceable in State Court.

Affirmative Action Under Public Law 94-142

Section 606, Employment of Handicapped Individuals, of Public Law 94-142 states: "The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ an advance in employment qualified handicapped individuals in programs assisted under this Act." Note the terminology "...make positive efforts...." Public Law 94-142 stops short of requiring its recipients to establish Affirmative Action programs. To determine the requirements of Section 606 of the Act, we must examine its implementing regulation,

contained in 42 FR 42474 and comprising modifications to 45 CFR 121a. Sections 121a.150 and 121a.239 contain identical implementing language, the former applicable to State education agencies, the later to local educational agencies. Both require assurances that educational recipients will operate their programs in compliance with 45 CFR 84, HEW's implementing regulation for Section 504. Thus, compliance with the Section 504 Regulation, particularly Subpart B, assures compliance with Section 606 of Public Law 94-142, the Education for All Handicapped Children Act of 1975.

DISCUSSION QUESTIONS

1. The Final Report of the New Jersey Conference on Handicapped Individuals advocated setting aside specific positions for the severely disabled. Do you feel this is appropriate?

2. The Department of Labor seems to feel that compliance reviews, in addition to complaints, are necessary for adequate enforcement of Section 503. Section 504 is complaint oriented, only. Do you feel compliance reviews will be necessary?

3. Would you counsel a handicapped person to answer the voluntary questions concerning disability on an employment application? Would your answer be different for Federal contractors covered under Section 503 and Federal grantees covered under Section 504?

4. There have been many complaints concerning the varying ground rules of the several Federal and State regulations concerning equal employment opportunity and affirmative action. Do you feel this is a real problem? Do you have any suggestions for simplification?

5. Do you feel goals and timetables are appropriate for the employment of the disabled?

6. Many have complained that the ground rules for reasonable accommodation are so broad as to be unenforceable. Do you agree? Do you have any suggestions for more specific ground rules?

7. Most experts agree that serious disincentives to employment exist in current SSI and SSDI regulations. What changes would you advocate to end these disincentives?

8. Medical departments frequently complain of a serious problem in certifying physical capabilities to do particular jobs. On the one hand, an injured employee, desirous of Workmen's Compensation and retirement, considers his disability too severe to allow job accomplishment. On the other hand, a disabled individual, possibly with more severe impairments than the injured worker, is requesting certification of capability to accomplish the job. In such circumstances, how can medical departments provide objective judgements?

9. Cornelius L. Williams, than President-Elect of the National Rehabilitation Association, writing in the May/June 1976 issue of the Journal of Rehabilitation, stated that the Section 503 regulation did not contain effective enforcement procedures. He characterized it as "...a tool that can not complete the job without a lot of lubrication...." Do you feel that non-aggressive legislation such as Sections 503 and 504 will go further to increase the number of disabled employed than laws and procedures containing threatening elements?

10. Beatrice Wright in her book Physical Disability- A Psychological Approach, expressed the opinion that once the handicapped are integrated into employment settings, the fear and discrimination decrease and the handicapped are accepted as persons. Do you agree with this opinion?

11. The June 1978 issue of Disabled USA contains an article entitled "The Feds Are Coming...Finally." The article quotes Secretary of Labor Ray Marshal as follows: "Voluntary programs work best, when accompanied by enforcement... There's nothing like the threat of a hanging to concentrate your thoughts...." What is the "hanging" to which Secretary Marshal referred? Do you agree with the Secretary's sentiments?

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CHAPTER VII

PRESCHOOL, ELEMENTARY, & SECONDARY EDUCATION

Subpart D of the regulation implementing Section 504 of the Rehabilitation Act of 1973, 29 USC 706, covers preschool, elementary, and secondary education. It comprises Sections 84.31 through 84.39 of the regulation. Subpart D will be the primary focus of this chapter, but, we will also highlight the requirements of other subparts as they pertain to the elementary and secondary education millieu. Although the regulation has some effects on private school providers, we will concentrate primarily on its significance to local school boards.

Subpart A, General Provisions, contains several requirements applicable to boards of education. First, each board must appoint an employee who will be responsible for its efforts to comply with 45 CFR 84, the Section 504 Regulation. Appointment of this official must be publicized to employees and their organizations, parents, and the general public. At the same time, boards are required to give public notice that they do not discriminate on the basis of handicap in violation of Section 504 and its implementing regulation. Announcement of this policy and appointment of the responsible official at a public meeting, with appropriate entries in the minutes of that meeting, should fulfill this requirement. If a school district has an informational brochure it distributes to parents, students, or employees, this brochure should include a statement of the policy on nondiscrimination. Those school districts operating adult education or summer recreation programs should also include the nondiscrimination statement in their program brochures.

Boards of education are also required to adopt grievance procedures, incorporating appropriate due process standards, providing for resolution of complaints alleging discrimination prohibited under Section 504. The primary impact of this requirement will be in the employment area. (The appeals procedure contained in Chapter 28, Title 6 of the New Jersey Administrative Code adequately covers educational appeals.) It may be necessary to amend local employee grievance procedures to cover the aspects of discrimination based on handicap. A thorough discussion of the structure of required grievance procedures is contained in Chapter II.

Subpart A also requires each board of education to conduct a self-evaluation of its policies and procedures and to modify any which are found not to be in accordance with Section 504 and its implementing regulation. This process must be completed prior to June 3, 1978. The process must be undertaken in consultation with handicapped persons or their organizations. A public record of the process must be kept, including the names of the persons involved, an enumeration of the areas examined and problems identified, and a description of the remediation taken. Dolan has recommended the composition of the self-evaluation team include representatives of administration, staff, child study team, board of education, local handicapped citizens, and parents of handicapped children. It was suggested that the last two categories make up at least 50% of the committee membership.[1]

The last portion of Subpart A of major importance to local boards is

the submission of required assurance forms. Under Section 84.5(a) of the regulation, local boards are required to sign and submit an Assurance of Compliance, HEW Form 641. This submission has been a long standing procedure also required by HEW in conjunction with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Admendments of 1972. It represents a good faith commitment to comply with the law and its implementing regulation. It is considered a contract which, in effect, conditions receipt of federal financial assistance on compliance with Section 504 and its implementing regulation.[2] When applying for funds under the Education of All Handicapped Children Act, Public Law 94-142, boards must include an assurance form or incorporate it by reference, if it has already been filed.[3] This same assurance will also be required for any other application for federal financial assistance.

School districts also have requirements under Subpart B, Employment Practices, and the New Jersey Law Against Discrimination. The subpart provides that no qualified handicapped person may be discriminated against in hiring, salary, promotions, benefits, or job assignments based upon handicap. It also introduces the concept of "reasonable accommodation," something which has been in effect for federal contractors since 1974. Under this concept, a board must make "reasonable accommodations" for the physical or mental limitations of the handicapped employee or applicant, unless it can be demonstrated that the accommodation would impose an "undue hardship" on the district. Reasonable accommodations could mean facilities modifications, job restructuring, or modified work schedules. Factors to be considered in determining "undue hardship" includes the size of a program and its

budget, the type of operation, and the nature and cost of the necessary modifications. In the commentary accompanying the promulgation of the Section 504 Regulation, an example is provided: "...Thus a small day care center might not be required to spend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job."[4] Clearly, this area will require careful, case by case interpretation. However, the experience of many industries concerning reasonable accommodation has been very positive, opening up a new source of talented, dedicated workers. The key for school boards will be to take an open-minded attitude, stressing the capabilities, rather than the disabilities of an applicant.

Placing disabled individuals into classroom teaching situations has been and remains a highly controversial subject. The best known judicial decision on what constitutes "reasonable accommodation" concerns a blind teacher. His New York district attempted to retire him after he went blind, alleging that the handicap interfered with the ability to teach. The decision of the court was that blindness, in and of itself, does not impair the capability to be an effective teacher.[5] The school system was required to supply the teacher with whatever special resources were necessary to carry out the ancillary functions of paper grading, examination proctoring, or calling on students who raise their hands. An extensive study of the employment of blind teachers in elementary and secondary schools was conducted by Dr. Edward Huntington in 1969.[6] He administered questionnaires on potential problem areas such as lunchroom supervision, test administration, fire drills, and recordkeeping. For all

categories, Dr. Huntington found that either the blind teacher could do what appeared at first to require sight, (for example, lead children out of the building at fire drills), or that compensating substitutions could be made easily. Huntington also found that the amount of extra resources necessary to accommodate the blind teacher was normally very minor; braille typewriter, a cassette tape recorder, or the occasional use of an honor student to help proctor examinations.

In 1971, Dolan examined the orthopedically handicapped in careers as classroom teachers.[7] Dolan found that the orthopedically handicapped were grossly underrepresented in the population of classroom teachers. However, there are at least four studies (Contini in 1947,[8] Condon in 1957,[9] Mase and Williams in 1963,[10] and King in 1966[11]) attesting to the capability of the orthopedically handicapped to meet the demands of the teaching profession. King's study concerned the New Jersey environment in particular.

Despite such scholarly evidence, litigation in this area is fairly common. In 1976, the Marion (Indiana) Community Schools entered into a consent decree with Ms. Linda Kay Garshwiler. The board agreed to hire Ms. Garshwiler, who is legally blind, for a high school teaching position and, also, to award her an adjusted date of tenure, plus compensation for wages she lost during the litigation process.[12] In April 1977, the United States Court of Appeals for the Third Circuit affirmed a very broad district court decision affecting the employment of handicapped persons as teachers.[13] The Philadelphia School District had denied Ms. Judith Gurmankin, a blind secondary school teacher, entrance to the

Philadelphia Teachers' Examination. The school district claimed that blindness makes one unqualified to teach sighted students. The district court found otherwise and ordered the school district to offer Ms. Gurmankin employment as a secondary school teacher with seniority dating back to the date she would have been offered suitable employment had she been allowed to take the examination. The court found no merit in the district's contention, upon appeal, that the order would cause some other teacher to be "bumped." Dolan has documented a similar case involving an orthopedically handicapped teacher, Ms. Judy Heumann, and her difficulties with the Board of Education of the City of New York.[14] The board denied Ms. Heumann the opportunity to take the teachers' examination claiming that the "...board has to balance an appplicant's desire to teach against the safety of the children...."[15] A New York Times editorial categorized the board's position as "...heartless and thoughtless nonsense."[16] Ultimately, the board was ordered by a federal district court to change its position.[17]

Subpart C, Program Accessibility, may be the most controversial part of the Section 504 Regulation with regard to elementary and secondary education. It states that no qualified handicapped person may be denied participation in a program because a recipient's facilities are not accessible. While this does not mean that every building and every classroom must be made barrier-free, it does mean that the practice of segregating physically handicapped students in special accessible facilities as an administrative convenience is now prohibited.[18] The practice has not been unknown in the State of New Jersey.

To affect compliance, each school district is required to develop a transition plan which identifies physical obstacles and describes methods

and schedules for corrections. All programmed work must be completed by June 3, 1980. The board must designate one person to be responsible for the transition plan and handicapped persons must be included in the planning process. In earlier chapters, the author has advocated that one official and one committee be responsible for the development of both this transition plan and the required self-evaluation process of Subpart A.

In developing the transition plan, it is necessary to provide for "program accessibility", that is, the capability to participate fully in the program. For example, let us consider a single school, K-6 district with a two-story building. If the district could provide all activities for handicapped students on the first floor without separating them from their peers, then an elevator would not be necessary and modifications would not be needed on the second floor. Of course, modifications such as entrance ramps, grab bars, and wider bathroom stalls might be required on the first floor.

One very pertinent question is how many buildings in a multi-school district must be modified. This question is not clearly addressed by the regulation, but we can get some indication from other sources. In its Notice of Intent promulgation, HEW included an Inflationary Impact Statement as required by Executive Order 11821.[19] The Inflationary Impact Statement attacked the question of cost of program accessibility in elementary and secondary schools. The estimate is based on modifying one-third of the elementary and secondary school buildings. The rationale used is illuminating and is quoted here:

> Only about 10% of all elementary and secondary school children

> are handicapped and a much smaller percentage, probably not exceeding 1%, have those kinds of physical handicaps that require special modifications of buildings. Thus, most recipients should be able, by providing the required transportation, to assign all of their physically handicapped children to either new or already accessible existing facilities. For example, even a moderate size local system (say with only five to ten separate buildings) with no new or already accessible buildings, should have to modify only two or three of its buildings. Similar percentage factors and reasoning apply also to the schools viewed as employees of adult handicapped individuals. Thus, the cost estimates, based on our assumption of one-third, appear to be very conservative.

In the commentary accompanying the Notice to Issue promulgation, HEW notes that there is a limit on the acceptable degree of flexibility allowed to a school district under Subpart C with respect to physical accessibility of its programs.[20] It notes that the regulation "...does not require a school district to make every classroom and school building barrier-free...." Therefore, the "program accessibility" concept "...may result in the placement of an orthopedically handicapped child away from his or her neighborhood school...." It states, however, that "...such a child may not be placed in a classroom or school that is primarily for handicapped children," simply to fulfill the requirement for a barrier-free environment.

The regulation itself and the commentary accompanying its promulgation also provide us guidance.[21] The question of whether neighboring school districts could agree to send all orthopedically handicapped students to an accessible school in one district is answered by Section 84.34(a) states: "...a recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the

person in the regular environment with the use of supplementary aids and services can not be achieved satisfactorily...." (Emphasis mine.) This viewpoint is further strengthened by the prohibition against consortia as a method for compliance in the university environment.

Against this background, the author will offer an opinion of a "reasonable" plan for a typical district. Assume the district is K-12 with one high school, one junior high school, and six K-6 elementary schools, all with barrier problems. Clearly, the high school would have to be made accessible and, probably, all floors would be involved because of the specialized nature of the programs. The junior high school would also be affected, although it might be possible to eliminate modification of upper floors through administrative action such as modifying class schedules. Concerning the grade schools, the author would advise modifying between one-third and one-half of them, dependent upon the extent of modifications required. The author would consider an elevator in an elementary school only in a very unusual case; administrative scheduling should be adequate to provide the necessary "program accessibility" on one floor.

Dolan studied the cost of achieving program accessibility in New Jersey elementary and secondary schools.[22] He found that the large number of school districts in New Jersey, and the resulting small average number of buildings per district, may have a tendency to increase the cost of achieving program accessibility in this state vis a vis another state with fewer districts. The rationale has to do with the possibility of only modifying a percentage of buildings of each type within a school district. A district with five high schools might only have to modify one. However, in New Jersey, it is characteristic of many school

districts to only have one building of a particular type. This negates the possibility for the primary mode of cost saving inherent in the program accessibility concept. Dolan estimated the cost for achieving program reliability in New Jersey's elementary and secondary schools at $44.5 million. While accurate nationwide figures are not available, the U.S. Office of Education has estimated that necessary removal of architectural barriers in elementary and secondary schools could cost as much as $2.78 billion, an amount essentially equivalent to the total proposed federal contribution for Public Law 94-142 by 1982.[23]

There is, obviously, great concern regarding the funding of program accessibility. Section 607 of the Education for All Handicapped Children Act, Public Law 94-142, provides mechanisms for grants to remove architectural barriers. President Carter's present budget, however, contains no funding for this purpose. U.S. Commissioner of Education Ernest Boyer said that colleges generally present "...immediate problems more acute than the elementary school structure arrangement-- a single building with a single story...."[24] Office of Education Budget Director, Cora Beebe said that because of the service mandate in Public Law 94-142, all special education dollars are being channeled into direct services rather than barrier removal.[25] Proposals to fund Section 504 compliance have been introduced into the Senate by Senator Jennings Randolph and into the House of Representatives by James Jeffords.[26] However, the administration is not supporting the proposed legislation and groups of the disabled are opposing it on the basis that the cost estimates are based upon sketchy and faulty calculations.[27] The disabled also fear that enforcement of Section 504, which they

believe is based upon the principle of equity under law, will become contingent upon the availability of funding. Thus, it appears to the author that the infusion of any large amount of Federal money for the removal of architectural barriers in elementary and secondary schools is highly unlikely. It is, therefore, exceedingly important that school districts fully understand the concept of program accessibility and utilize the input of handicapped citizens to the maximum in developing transition plans which provide maximum accessibility with minimum cost. Small tasks, such as the construction of ramps, could conceivably be accomplished by high school shop classes on a project basis. Districts with larger requirements should be aware of the possibilities of funding under yearly Public Works Acts and the Comprehensive Employment and Training Act (CETA). Both pieces of legislation give priority to projects for the removal of architectural barriers.

SUBPART D

Subpart D is specifically applicable to the educational environment of elementary and secondary schools. Its requirements are summarized in Section 84.33(a) which requires each district to "...provide a free appropriate public education for each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. The subpart, thus, conforms to the standards established in Mills v. Board of Education of the District of Columbia,[28] Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania[29] and LeBanks v. Spears.[30] PARC and Mills are landmark decisions which make it clear that handicapped

children have a constitutional right to public educational resources, regardless of the severity of their handicap. LeBanks limits the placement of children under 16 in vocational rehabilitation programs as an alternative to regular education. Equally significantly, it broadens the concept of education beyond the narrow area of schooling to "...a continuous process of developing life skills needed for the effective coping with developmental tasks and demands as well as with environmental tasks and demands...."

Despite strong legal precedence on the right to education despite severity of handicap, numerous litigations on the subject of exclusions are in the courts. Sherer v. Maier concerns the North Kansas City School Board's refusal to admit an elementary school student with spina bifida because she requires daily catheterization.[31] In CARC v. State Board of Education, the plaintiff hopes to have a section of the Connecticut General Statutes declared unconstitutional by the federal district court.[32] The section excludes, from the class of mentally retarded individuals who are entitled to special education, those children requiring custodial care, those who are without clean bodily habits, and those who are not responsive to directions or who have no means of intelligible communication. In Donnie R. v. Wood, plaintiffs alleged that a program of home instruction was wholly inadequate and inappropriate to the educational needs of their thirteen-year-old client who is afflicted with emotional and mental handicaps.[33] The school board had approved the home instruction program after an incident in which the student had been involved in a fight. The case was settled by consent decree which required an immediate educational evaluation and provision of appropriate education services within the public school.

The words "free" and "appropriate" in the general requirement, Section 84.33(a), are significant enough to each warrant an explanation. "Free" means without cost to the handicapped person or his or her parents, except for those fees that are imposed upon nonhandicapped persons or their parents; school lunchs, athletic events, concerts, and the like. If the school district places a handicapped child in a program outside the district, it must provide free transportation. In addition to Section 504, this requirement is specified in NJAC 6:28-3.4. If a residential program is dictated, the program, including nonmedical care and room and board, must be provided at no cost to the handicapped person or his or her parents. The question of assumption of residential cost has generated considerable furor in the State of New Jersey. From the federal standpoint, the only requirement is that the placement be free. The Section 504 Regulation is quite specific that it is not laying the requirement on any particular public agency. The Public Law 94-142 Regulation, 45 CFR 121a, is mute on the subject. The difficulty arises at the state level to determine which public agency will be responsible for these residential costs. An attempt to clarify has been made in the proposed changes to Title 6, Chapter 28 of the New Jersey Administrative Code, programmed for publication in the New Jersey Register in late June 1978. Section 4.3(g) would have local school districts pay residential costs when the placement is made for educational purposes upon the recommendation of the local child study team. If the residential placement is made by another public agency, and is, therefore, for reasons other than educational, that public agency would be responsible for residential costs. The local school district, of course, would remain responsible for educational costs. (An example would be the

residential placement of a child due to extraordinarily disruptive home conditions.) There are, at present, a fairly significant number of cases where parents in New Jersey are bearing the financial responsibility for residential costs of placements made by local school districts. One such case is presently in the courts, Sussan v. East Brunswick Board of Education.[34] An amicus curiae brief has been filed by the Education Law Center on behalf of the New Jersey Association for Retarded Citizens in this case.

PUBLIC LAW 94-142

The word "appropriate" means, in context, designed to meet the individual educational needs of handicapped persons and adhering to the regulation's provisions with regard to educational setting, evaluation and placement, and procedural safeguards. The regulation makes clear that compliance with Public Law 94-142, and its regulation, will result in the provision of an appropriate education, consistent with the requirements of Section 504. The New Jersey Department of Education has proposed changes in New Jersey Administrative Code, Title 6, Chapter 28, to bring it in line with Public Law 94-142. Their proposal will be promulgated in the New Jersey Register in late June 1978. Thus, New Jersey school districts will be assured compliance with Sections 84.33 through 84.36 of the Section 504 Regulation through compliance with NJAC 6:28 1-1 et seq. An analysis of Public Law 94-142, its implementing regulation, and the proposed implementing New Jersey Administration Code is beyond the scope of this work. However, for reference, we will

attempt a short summary of the Public Law's most salient features with some commentary on the Jersey scene:

A free public education will be made available to all handicapped children between the ages of 3 and 18 by September 1978; between 3 and 21 by September 1980. However, these age limits are only applicable if consistent with state law. In New Jersey, education of handicapped children is already mandated to the 21st birthday. There is, however, no provision for the 3 to 5 age group. Under a variety of federally funded demonstration programs, approximately 30% of the 3 to 5 age group is being served. Some authorities feel this will eventually require the entire population to be served since Public Law 94-142 mandates provision for all once the service becomes "customary."[30] Public Law 94-142 authorizes incentive grants of $300.00 over the regular allocation for each handicapped child between the ages of 3 or 5 who is provided special education and related services.

Each handicapped child will have an "Individualized Educational Program," a written statement developed jointly by school officials; the child's teachers and parents; and, if possible, the child, himself herself. It will include an analysis of the child's present achievement level, a listing of short-range and annual goals, an identification of the specific services which will be provided toward these goals along with statements of when they will be provided and how long they will last, and a schedule for checking on progress and coordinating any necessary modifications. The IEP will also include a statement of the extent to which the child will be able to participate in regular school programs.

Handicapped and nonhandicapped students will be integrated to the maximum extent possible. Handicapped students will be placed in special classes or special schools only when the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, even if supplementary aids and services are provided. While this does not absolutely mandate "mainstreaming," it is clearly a call for greater integration. In the author's opinion, the course of professional thinking seems to be moving in this direction. Holden notes that special schools give handicapped persons basic skills they need to compensate but, also, perpetuate segregation.[36] Yohalen speaks of the deleterious effects of such segregation and advocates integration, even if it is possible only at periods such as playground, recess, or lunch.[37] College officials note the relative inability of handicapped students from segregated educational backgrounds to cope with the demands of independent college life.[38] In what the author considers to be an outstanding work, Mullins questions the validity of characterizing handicapped children educationally on the basis of medical evidence. She finds that"...teachers conducting classes for physically handicapped students have the widest range of age, intelligence level, and types of behaviors of any classes in education including the one room schoolhouse...."[39] The Clark County School District in Las Vegas, Nevada offers an excellent example of the possibilities of integration. The district has a population of 70,000 students in 85 schools. Only 52 physically handicapped children receive special education in separate settings. Marr characterizes the program as "...a Las Vegas gamble that has paid off...."[40]

Tests and other material used in placing handicapped children will be prepared and administered so as to be racially and culturally nondiscriminatory; will be presented in the child's native language; and will reflect the parameter to be measured rather than the child's handicapping condition. It is essential that placements not be made based on testing alone. Other factors such as a handicapped child's ability to cope with non-school environments must also be considered. The weight given to each parameter must be documented.

All decisions concerning classification and placement will be preceded by consultation with the handicapped child's parents. Parents will be given the right to challenge classifications and placements with the principles of due process, observed. Changes to the child's program cannot be made until the completion of the appeals process, unless there is a major extenuating circumstance, for example the child's being a physical danger to himself or those around him.

Comprehensive personnel development programs, including inservice training for regular as well as special education teachers, will be established and conducted. Guidance to local districts on development of their programs will be contained in the Annual Plan of the State Department of Education.

A considerable amount of federal aid is associated with Public Law 94-142. By 1982, the law authorizes aid based on the number of handicapped children being served multiplied by 40% of the national average expenditure for education of each handicapped child. 75% of the aid is channeled to local school districts; 25% is maintained at the state level. The state is charged with submitting an annual plan outlining its strategies for providing full services in the most normal

settings feasible and its system for assuring compliance at local levels. The Office of Education and the State Department of Education are authorized to withhold funds from local school districts which do not comply. This can affect not only Public Law 94-142 funds but, also, funds earmarked for the handicapped under the Elementary and Secondary and Vocational Education Acts. This completes our synopsis of Public Law 94-142 provision.

NONACADEMIC SERVICES

Section 84.37 of the Section 504 Regulation covers nonacademic services and generally requires that handicapped students be given equal opportunity for participation in athletics, special interest groups or clubs, and recreational activities. One facet of school activity very definitely affected by this section is physical education and athletics. A school may offer separate or different physical education programs to handicapped students, only if absolutely necessary to achieve the educational goal. A much more desirable system is integration with activity modification, as required. In Chapter VIII, the author devotes considerable time to the question of physical education modifications and lists reference sources for further information. In the interscholarstic athletics area, schools may not deny qualified handicapped students the opportunity to participate. The commentary accompanying the promulgation of the regulation uses the example of mobility limited students on a school's archery team, deaf students on its wrestling team. The literature of the physical education field now

abounds with examples of athletic endeavors by handicapped persons. Tennis and swimming are routinely enjoyed by many paraplegics; runners using wheelchairs now compete in the Boston Marathon. The author, however, recommends a certain caution in this area based on current litigation. In Kampmeier v. Nyquist, the parents of two junior high school students, each blind in one eye, sued under Section 504 because the local school district would not allow their children to participate in contact sports. The school was upheld by the Western District Court of New York and by the U.S. Court of Appeals for the Second Circuit.[41] Thus, school districts still maintain a "parens patriae" interest in their students' well being, but it must be balanced against rights for nondiscriminatory treatment. Interestly, the same Western District Court granted an injunction against the National Hockey League which had attempted to prevent Gregory T. Neeld, who has only one eye, from playing with the Buffalo Sabres.[42]

Section 84.38 forbids discrimination in preschool and adult education programs. Qualified handicapped students cannot be excluded from these activities and the needs of handicapped persons must be considered when the activities are being planned. Thus, an adult evening school must provide interpreters for deaf students, if requested, and must assure at least program accessibility in its facilities.

Section 84.39 covers private schools who are recipients of federal funds. Since both direct and indirect recipients are covered, this section applies to those private schools to whom handicapped students are tuitioned by local school districts. Such schools may not exclude any handicapped student whom they could handle with "minor adjustments." If

they charge a different tuition for handicapped students as opposed to nonhandicapped, the difference must be justified by actual cost of services provided. They must exercise the same care in placement testing and provide the same elements of due process to parents. Their nonacademic and extracurricular activities must provide equal opportunities for their handicapped students.

DISCUSSION QUESTIONS

1. If a local school district conscientiously follows all requirements in Title 6, Chapter 28 of the New Jersey Administrative Code, will the district be completely in compliance with Section 504 of the Rehabilitation Act of 1973? The author feels not. Do you agree?

2. Writing in the February 1978 issue of Education and Training of the Mentally Retarded, Nancy K. Klein states her feeling that an "essentialist viewpoint" has captured our schools and is bent on eliminating "unwilling learners who interfere with other student's pursuits." She feels that special education has cooperated with the essentialists and "assumed responsibility for thousands of children that regular education wanted as little to do with as possible." She feels that schools should be as pluralistic as society. She advocates highly individualistic education to include varying degrees of difficulty. Do you agree with any or all of Ms. Klein's analysis?

3. Our high school has several deaf students who are mainstreamed with supportive service in a resource room. They have requested we provide an interpreter for them at the next school play. Are we obligated to do this?

4. We have several mobility-limited students attending our accessible middle school. We provide them transportation to and from school in a small mini-bus. Since Section 504 now requires we provide services in the most integrated possible way, must we now purchase regular buses with wheelchair lifts?

5. Several of our deaf students are constantly complaining that their hearing aids do not function properly. Does our school have any responsibility toward these hearing aids?

6. The chemistry laboratory is on the second floor of our high school. The building is not elevator serviced. May we provide chemistry to a student who uses a wheelchair, on a tuitorial basis, on the first floor? Must we install an elevator or move the chemistry lab?

7. All seats in our football stadium are reached by climbing a flight of stairs. In the past, we have allowed our students who use wheelchairs to sit together on the playing field. May we continue this practice? Must we include some scheme to make our stands accessible in our transition plan?

8. Our district has three students in residential placements. The noneducational costs for these placements exceeds $10,000 per student. At present, the parents pay for these costs. Must the school district begin to assume them now? Can we obtain necessary relief from our budget caps?

9. Our summer recreation program includes a swimming class for handicapped children. May we continue this program?

10. One of our tenured teachers is beginning to loose her sight. She has requested we provide her with a teacher's aide to assist with grading papers and other administrative tasks. Must we provide the teacher's aide?

11. We have a girl who uses a wheelchair on our high school swimming team. Our home pool and associated locker rooms are accessible. Some of the schools we swim against, however, do not have accessible facilities. Can we continue to compete against them?

12. We have no mobility-limited students in our entire school system. Our board sees no reason to make expensive building modifications which have no immediately forseeable use. They desire to write a policy which states that such modifications will be made if and when required. Would this constitute compliance with Section 504?

13. We are sending all of our 6th grade teachers to a one-week summer seminar at Columbia University. Their room and board is included in the fee we are paying for the seminar. One of our teachers is arthritic and has requested we provide her an aide to assist with dressing, bathing, etc. Must we provide the aide?

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CHAPTER VIII

POSTSECONDARY EDUCATION

Subpart E of Title 45, Code of Federal Regulations, Part 84 covers Postsecondary Education. It implements Section 504 of the Rehabilitation Act of 1973.

While Subpart E is directly applicable to the college and university situation, compliance with it does not assure compliance with the entire regulation. A college or university must also concern itself with the administrative provisions, the grievance procedures, and the self-evaluation requirements of Subpart A; the employment practices, reasonable accommodation, and employment testing requirements of Subpart B; and the program accessibility requirments of Subpart C. In general, Subpart E exists to further delineate and specify the requirements of the other subparts. Colleges and universities must also realize that other federal and state regulations and codes impact upon their compliance with Section 504. In the employment area for example, most institutions, as federal contractors, are also subject to Section 503 of the Rehabilitation Act and its implementing regulation, 41 CFR 60-741, with the concommitant requirement for Affirmative Action Programs. All New Jersey colleges and universities are affected by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and its implementing regulation, N.J.A.C. 13:4-1 et seq. Concerning program accessibility, New Jersey colleges and universities should realize that they are governed by more stringent state law and regulation, N.J.S.A. 52:32-1

et seq., (Chapter 220, Laws of 1975), and N.J.A.C. 17:19A. For further information on these requirements, colleges and universities are referred to other chapters of this work.

BACKGROUND

As discussed in Chapter I, there was little Congressional or public debate on Title V of the Rehabilitation Act of 1973. Realization of the full impact on colleges and universities began when the Department of Health, Education, and Welfare issued its Notice of Intent to Issue Proposed Rules on May 17, 1976.[1] In the Notice, the Secretary of HEW asked colleges and universities to comment on four specific issues: 1) Whether colleges and universities should be required to adjust academic requirements because of the limitations of otherwise qualified handicapped applicants and students; 2) Whether colleges and universities should be required to supply auxiliary aids, such as taped texts, readers, and interpreters, if such aids were not provided by a vocational rehabilitation agency; 3) What the responsibilites of colleges and universities should be with respect to nonacademic and extracurricular activities and services; and 4) In what way, if at all, cost or difficulty in compliance should effect the college's obligations?

On July 16, 1976, HEW issued a proposed regulation.[2] In the preamble, the Secretary expressed extreme pleasure at the extent and quality of the response to the May 17 Notice of Intent. On the first issue, adjustment of academic requirements because of the limitations of

otherwise qualified handicapped students, most commenters felt that adjustment should not be allowed to progress to waiver. The preferred approach seemed to be adapting courses of instruction to meet individual needs. Some commenters, however, felt that federal involvement in curriculum was contrary to the spirit of Section 432 of the General Education Provisions Act.

The second issue, supplying of auxiliary academic aids, generated strong response concerning costs. The consensus seemed to be that readers, interpreters, and other aids should be the financial responsibility of the student, in conjunction with state vocational rehabilitation agencies or similar organizations.

The third issue, responsibility of institutions with respect to nonacademic and extracurricular activities, did not generate as many comments. However, flexibility was advocated with a key concept being the provision of comparable, not necessarily identical, services. There were also comments on the practical difficulty of providing opportunities in physical education and athletics to relatively small numbers of handicapped students.

On the fourth issue, the consideration of cost in assessing compliance, a great deal of comment was received. Universities expressed great concern with the cost of eliminating architectural barriers. Handicapped persons on the other hand protested that cost should not be a factor that could be used to deny basic human rights.

Another comment period followed the July 16, 1976 Notice of Proposed Rulemaking. Chapter I delineates the extraordinarily comprehensive efforts of HEW to obtain public comment during this period and their

extreme success. Comments received were summarized in the analysis which accompanied the issuance of the final regulation on May 4, 1977.[3] Higher education comments centered on Subpart C, Program Accessibility, and Subpart E, Postsecondary Education. Several institutions suggested that one college in a geographic area could be made accessible and other colleges participate in that school's program through consortia. The Department, however, discounted the suggestion, determining that it would constitute a discriminatory practice and would be inconsistent with the basic objectives of the statute. Concerning Supbart E, universities reiterated concern with the cost of auxiliary aids. The Department, however, maintained its position that the institution must provide such aids, even if they are not available from a state or private agency. The Department, however, stated its anticipation that this would occur only in very rare instances. Thus, during the entire rulemaking process, colleges and universities expressed great concern regarding the costs of implementation of Section 504, particularly with regard to architectural barriers and auxiliary aids.

Even before the implementing regulation was promulgated, Section 504 had resulted in a suit against an educational institution. The parties were Nelda K. Barnes and Converse College in Spartanburg, South Carolina. Ms. Barnes, an English teacher at the Cedar Springs School for the Deaf and the Blind, is required by South Carolina Educational Code to earn continuing college credits to maintain her teacher's license. Ms. Barnes is deaf and requires an interpreter to participate in classroom activities. She requested an interpreter be provided at university expense based on Section 504 of the Rehabilitation Act. The

college refused and Ms. Barnes brought action in Federal Court asking for injunctive relief. On July 13, 1977, U.S. District Judge Robert W. Hemphill found for the plantiff and ordered Converse to provide interpreter services.[4] Converse is challenging the ruling based on the contention that the regulation, itself, is unconstitutional. College attorneys argue that the regulation violates the Fifth Amendment ban on taking private property for a public service without just compensation. Herbert Hammett, an attorney for the college, explains, "We aren't talking about Nelda Barnes; we're talking about the setting of a principle. The real question is who will come up with the money."[5] Commenting on the same case, Jack W. Peltason, American Council on Education, said: "...The estimated cost of that interpreter service was $750; the tuition for the course involved was less than $300. Thus the college, or more precisely the other students enrolled in the college, was compelled to bear the cost of meeting what Congress has deemed a socially desirable objective. While we applaud the goal of equal educational opportunity for the handicapped, we believe that Congress has a responsibility to provide sufficient funding from general tax revenues to defray the substantial costs...."[6]

During House of Representatives hearings on Section 504 implementation in September 1977, Mr. Peltason requested the appropriation of approximately $1.5 billion to cover implementation costs. He suggested a new authority, enacted as an amendment to Section 504, as the most effective way to proceed. He admitted, however, that ACE's estimates were rough since "...the actual cost of compliance will depend upon how HEW interprets its regulation and what is required of individual institutions...."[7] The Chairman of the hearings, Representative John Brademus of Indiana,

responded to Mr. Peltason that "...you are in here wanting money, tax dollars, and ballpark estimates just don't do when you want public tax dollars."[8]

The Administration's new budget request calls for release of $30 million from the Higher Education Facilites and Loan Insurance Fund for the removal of barriers in colleges and universities. Additionally, Senator Jennings Randolph of West Virginia has introduced a bill, Senate 2302, authorizing the federal government to pay 80% of the costs of implementation of Section 504. Senator Randolph's bill applies only to educational institutions. In the House, Representative James Jeffords of Vermont has introduced H.R. 7626, authorizing $6 billion to carry out the purposes of Section 504.[9] Organizations of the handicapped have opposed such legislation characterizing it as premature, since it is impossible to know precisely what implementation is likely to cost.[10] Mr. James Gashel of the National Federation of the Blind expressed another prevalent fear of the disabled: "...It is a dangerous and unacceptable precedent to create the principle that a funding authorization should be established in Section 504. To do so would suggest to administrative enforcement authorities and the courts that compliance obligations extend only as far as money is authorized and appropriated...."[11] In view of the current controversy, it does not seem likely to the author that colleges and universities will receive any significant amount of direct federal funding for Section 504 implementation costs in the near future. Thus, careful study of the Section 504 Regulation is of utmost significance.

PROGRAM ACCESSIBILITY

Before proceeding to Subpart E, the author feels some specific

comments on the subject of program accessibility in the university environment are in order. First, it appears that many of the concerns over program accessibility have been compounded by the lack of information, misinformation, and misinterpretation of the regulation.[12] The regulation does not mandate that colleges and universities become barrier-free. The criteria is program accessibility, which means that accessibility of activities may be achieved through such means as redesigning of equipment or rescheduling of classes to accessible buildings. Thus, universities should initially approach the accessibility issue from a programmatic standpoint, with structural modification being considered only after all other alternatives have been explored. For example, Boston University owns some 50 antique brownstone houses in which administrative and counseling functions are located. It has determined not to modify any of these buildings, but, rather, to schedule required administrative and counseling sessions for mobility-limited students in accessible locations.[13] A local example is Memorial Hall at Rider College, an academic classroom building. The first floor of this building is accessible but there is no elevator to the second and third floors. Students who can not climb stairs and desire to take a course scheduled on the upper floors are requested to contact the Student Development Center which makes arrangements for moving the class to an accessible location.[14]

Such a mix of administrative and architectural changes to achieve program accessibility is, in the author's opinion, best attacked in the transition plan required by Subpart C. While the regulation only requires the transition plan to include architectural planning, the

author feels the two subjects and their interface are better covered in one document. Additionally, the author stresses the significance of involving disabled persons and their organizations. Not only is this a mandate of the regulation, Section 84.22(e), but it also has tremendous practical significance. Michigan State University, for example, on the advise of its handicapped students, used relandscaping instead of ramping at short rise entrances. They also used path ramps instead of curb cuts. In addition to savings during the alteration phase, these modifications make snow removal easier and less costly.[15] The disabled themselves can provide considerable input when it comes to modifying environments by the least expensive, yet still effective, means. This is all the more significant since most schools of architecture do not offer curriculum on modifying buildings and programs for the disabled. Therefore, many consultants have never experienced this kind of a problem. The resultant lack of expertise frequently results in unimaginative solutions and quite exorbitant costs.[16] To quote Dr. Kent B. Kloepping, Director of Special Services Programs of the University of Arizona, "...If you want to develop services for handicapped students, don't go out and get a counselor for the handicapped...."[17] Use the resources available on your own campus, including your own disabled student population. Said Dr. Kloepping, "...you have to have someone who knows the particular university...."[18] Concerning the architectural aspects of the transition plan, it is of course essential that solutions be within the guidelines established by N.J.A.C. 17:19A.

The author suggests early liaison with the Divison of Buildings and Construction, Department of the Treasury. Should services of an

architect be necessary, try to pick one with experience or training in the area and then assure a close working relationship between the architect and the campus transition plan team. As a source of information on transition planning, particularly appropriate to the college and university environment, the author recommends Planning for Accessibility, published by the Association of Physical Plant Administrators.[19]

SUBPART E REQUIREMENTS

Subpart E comprises Section 84.41 through 84.47 of the Section 504 Regulation. These sections cover: (84.41) Applicability, (84.42) Admissions and recruitment, (84.43) Treatment of students in general, (84.44) Academic adjustments, (84.45) Housing, (84.46) Financial and Employment Assistance, and (84.47) Nonacademic services. We will cover each of these subjects, discussing the regulation itself, some methods for compliance, and difficulty or litigation on the subject to date.

Applicability

Section 84.41 specifies that the subpart is applicable to all postsecondary education programs and activities, including postsecondary vocational education, which receive federal financial assistance. This includes essentially every institution of higher learning in America. To quote Melvin Ladson of the Bureau of Education for the Handicapped, " It will cost you less than a dollar to send a letter to each (college or university) that does not receive federal assistance."[20]

Admissions and recruitment

Section 84.42 covers admissions and recruitment. In general, qualified handicapped persons may not, on the basis of their handicap, be denied admission or subjected to discrimination in admission or recruitment. There may be no quotas on the number or proportion of handicapped persons who may be admitted. There may be no preadmission inquiries into handicapping condition, except on a voluntary basis. Testing must be as nondiscriminatory as possible.

The preadmission inquiry requirement is essentially parallel to the preemployment inquiry guidance in Subpart B. Questions concerning handicap cannot be asked unless they are part of a mandated program to correct past discriminations or a voluntary program to overcome conditions that have resulted in limited participation. In either case, answering questions concerning handicap must be completely voluntary, the information must be kept confidential, and refusal to answer must not subject the applicant to any adverse treatment. Clearly, this guidance could cause difficulty with preadmission counseling programs for handicapped students. Some institutions consider such programs both desirable and necessary. They are considered desirable to provide institutions time for planning of necessary support services. They are considered necessary to compensate for what some believe is a lack of expertise among high school and vocational rehabilitation counselors. For example, such counselors are not normally knowledgeable on aspects of campus environments which could be tailored to meet individual and specific needs of a disabled potential student.[21]

For those institutions desiring a preadmission counseling system for prospective disabled students, the key is trust. Will the prospective students believe the institution is soliciting information to assist, rather than to discriminate? The author believes a positive "outreach" program can be valuable. The institution which advertises its desire to have disabled students as part of its community and which states its willingness to make appropriate accommodations is likely to instill such trust. For example, 12 colleges, unfortunately none from New Jersey, had displays at a May 1978 outreach conference for the deaf held at the Marie H. Katzenbach School.[22] Another effective method of outreach can be direct contact with vocational rehabilitation agencies and counselors at specialized schools for the handicapped. However, despite whatever success may be achieved in the areas of preadmission inquiries and preadmission counseling, universities must be prepared to accommodate handicapped students who do not identify themselves until they have been admitted. After admission, inquiries may be made to the degree required for program accommodations, provided the results of the inquiries are maintained on a confidential basis.

Admissions testing is a highly complex and potentially controversial area. First, no test which has a disproportionate effect on any class of handicapped persons can be used, unless the test has been validated as a predictor of success in the particular educational program involved and HEW cannot suggest another test with less disproportionate effects. Second, administration of tests must be such that the tests measure what they are proported to measure, rather than being indicative of the handicap of the person being tested. Third, accessible testing locations

and special testing arrangements must be available on the same basis as routine test arrangements.

Most New Jersey colleges and universities use the Scholastic Aptitude Test produced by the Educational Testing Service of Princeton, New Jersey. Special arrangements are routinely made for disabled students; readers for the blind, signing of instructions for the deaf, and alternate accessible sites for the mobility-limited. Unfortunately, however, when scores of tests taken under these special arrangements are reported to colleges and universities, they include a blanket disclaimer of the reliability of the scores because of the conditions of test administration. This presents two problems. First, it circumvents the preadmission inquiry prohibition of the regulation. Second, it amounts to an open admission that the testing may be reflecting the individual's handicapping condition rather than aptitude or achievement level. The author believes it is only a matter of time before the system will be challenged. It, of course, would be a discriminatory practice for a college or university to use the existence of the test disclaimer as a factor in admissions rating. To quote Mr. Tom O'Donnell of the National Center for Law and Handicapped: "...if in any way the effect of the information they (ETS) give to that college or university can be construed to be discriminatory, than it is challengeable."[23]

Treatment of students in general

Section 84.43 begins by enumerating a number of the aspects of university life in which discrimination is prohibited. The list is not intended to be all inclusive, but, rather to show the broad and sweeping

application of the regulation. Activities covered include academic, research, occupational training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, and extra-curricular activities. The section also requires colleges and universities to assure handicapped students equal participation in programs and activities which take place off campus. An example might be student teaching in local public schools. The regulation does not require that every school in which student teachers are placed be totally accessible. It does, however, require that handicapped student teachers be offered the same range in quality and choice of student teaching assignments as nonhandicapped students. The section also contains a general statement that programs and activities must be operated in the most integrated setting appropriate. This recognizes the concept that it may sometimes be necessary to provide separate facilities to achieve equal benefit, but allows such separation only to the minimum degree necessary.

Academic Adjustments

Section 84.44 requires a university to make modifications of its academic requirements to insure that such requirements do not discriminate against handicapped individuals. Modifications may include lengthening of the time for degree requirements; substitution of specific courses; or adaptation of the manner in which courses are offerred. However, the college does not have to alter any requirment that is essential to a degree program or that is directly related to a licensing requirement.

The licensing requirement exception is highly controversial. At present, Southeastern Community College in North Carolina has been taken

to court based on its decision to deny a deaf practical nurse admission to its registered nurse program. The college denied admission based on the belief that the applicant's hearing impairment would prevent her from being licensed as a registered nurse. The Federal District Court found for the college.[24] However, the National Center for Law and the Deaf has filed an appeal.[25] We are entering an era in which licensing requirements requiring specific capabilities are being challenged. The author advises colleges and universities to become enmeshed in this area as little as possible, unless they desire to enter the arena as a change agent in the public interest. If a disabled individual is academically qualified and has been counselled on possible difficulties in licensure, he or she should be given, in our opinion, the opportunity to try.

Of course, there are many areas where waivers and course modifications can be made without directly affecting essential elements of a degree program or licensing requirements. A deaf student could be allowed to substitute art appreciation for a required course in music appreciation. Course modifications, too, may be in order. A biology laboratory would be particularly difficult for a quadraplegic with minimal use of upper extremities. A possible course modification might be making the quadraplegic a member of a two or three member lab team, having him or her participate in all evaluations and reporting, and having him or her observe during the actual dissections. The quadraplegic would not receive a course grade on the technical quality of the dissections but would be responsible for knowledge of the apparatus and procedures and the specific information to be gained from the laboratory. The author

believes that modifications, where practical, are far more advantageous than waivers. The key to the whole area, in the author's opinion, is the establishment of appropriate administrative mechanisms. The author advises a two-level approach. First, the disabled student, in common with all other students, should have the ability to consult with a departmental adviser or the office of the Dean of the particular college of the university on such questions. Second, it is rational for the university to appoint some sort of coordinator or facilitator of disabled students affairs to "troubleshoot" problems which cannot be resolved through normal methods. Some disabled students will desire to coordinate all their dealings through normal channels as a matter of independence; others will desire to pursue their affairs through the special office. The latter group should be encouraged to go through normal channels, first. The author would consider it completely counterproductive to insist that all course waivers or modifications for disabled students be processed through a special office on campus. With the passage of time, one would hope that more and more of these problems will be worked out in the regular channels. Of course, an atmosphere of acceptance by the administration and faculty is needed to assure cooperation. Sensitivity sessions, conducted both by handicapped students and their advocacy office, would appear a very worthwhile addendum to the in-service training program of any college or university. Subpart A, Section 84.6, requires a college or university to evaluate its current policies and practices by June 3, 1978. This evaluation must be done with the

assistance of handicapped persons or their organizations. The author recommends that procedures for course waivers and modifications receive particular attention during this self-evaluation.

Auxiliary Aids

Next, we will cover the subject of auxiliary aids. Colleges and universities are required to assure that no handicapped student is denied the ability to participate because of the lack of educational auxiliary aids. These aids may include taped texts, readers for the blind, interpreters for the deaf, writers and note takers, and physical modifications to classroom equipment.

Taped texts or texts in braille should present little difficulty. Recordings for the Blind is a free national lending library with over 35,000 taped texts in its catalogue. New texts can be procurred given advanced notice. The Library of Congress and the New Jersey Library for the Blind and Handicapped can also be resources for taped materials. Therefore, the author sees little difficulty with colleges and universities complying with this auxiliary aid requirement; clearly, the resources are already available from other agencies. It would be appropriate, however, for the university's advocacy office to have information available on the subject. It also would be extremely helpful to have reading lists prepared in advance so that blind students could make their needs known to Recordings for the Blind on a timely basis. Obtaining reading materials is a critical skill for blind persons. Therefore, the blind student should be encouraged to take as much part in the procurement of reading materials as possible on an independent basis. To quote Mr.

James Gashel of the National Federation of the Blind: "...the states and the federal government cooperate in providing books for educational use. This library system is plentifully augmented by private and volunteer organizations...."[26]

Section 84.44(d), Auxiliary Aids, specifically mentions providing readers in libraries for students with visual handicaps. It remains to be seen whether this provision will be interpreted as illustrative or limiting. The National Federation of the Blind, which claims credit for insertion of the provision, states that their intention was to have a sighted person available to quickly look up a reference or pick out some material.[27] The commentary accompanying the promulgation of the Section 504 Regulation states that it is not required that readers be available at all times as long as a schedule of readers is available, is adhered to, and is sufficient to meet needs. In the author's opinion, the question of readers in libraries is best handled through the same system as is already in existence at a particular college or university for any other form of library assistance. A volunteer, a work-study student, or a staff person should provide assistance as needed. The scope of staffing can be determined experientially. The author does not believe it would be a discriminatory practice to ask blind students requiring considerable assistance in the library to make their need for readers known to the library staff in advance. Above all, the author advises the problem be handled by the library, not by an office of disabled students services.

Whether required by the Section 504 Regulation or not, many colleges and universities have seen fit to provide additional reader services to

blind and visually impaired students for the study environment. The norm is to use volunteer service agencies with coordination affected through a central office of services for disabled students. Some screening is required to assure that special needs such as fluency in foreign language or familiarity with highly technical terminology can be met. The author believes this is a highly valuable service which might be organized on every campus. Should needs go beyond what can be handled on a volunteer basis, blind students, normally, have an allowance from the Commission for the Blind which can be used for obtaining readers.

Some universities have determined to go even further. One idea which could be very inexpensively adapted would be establishment of a room in the library in which visually impaired students could work without disturbing other students. Tapes of texts could be played, readers conversed with, and notes typed. Another worthwhile, yet inexpensive, suggestion might be providing a special orientation to library services for blind students. Based on input from blind students, universities might consider the acquisition of certain specialized equipment. One is a speech compressor, available for about $85.00, which can be used to speed up taped presentations without introducing undue distortion. Another might be a reading enlarger for partially sighted students, in actuality a small closed circuit television system, available for about $2,000. A braille writer is available for approximately $150.00.[28]

The listing of required auxiliary aids in Section 84.44(d) includes interpreters or other effective methods of making orally delivered

materials available to students with hearing impairments. This provision has been, to say the least, very controversial. In Barnes v. Converse College, the right to interpreter services was upheld, but only on a basis of competing equities.[29] It was not a class action suit, but, rather one brought by an individual for preliminary, injunctive relief. Coloring the case is the fact that Ms. Barnes had to earn graduate credit in order to maintain her license to teach. In other words, continuing education was a requirement for recertification. These factors tend to negate Barnes v. Converse College as a true test of the interpreter requirement of the Section 504 Regulation. Judge Hemphill's opinion contains some wording indicative of his bent of mind: "...Although the danger of future expenditures under this statute is not a proper consideration in this law suit, this court is most sympathetic to the plight of the defendant as a private institution which may well be forced to make substantial expenditures of private monies to accommodate the federal government's generosity...No educational administrator needs to be reminded of the sad fact that federal money means pervasive, bureaucratic federal control and for pervasive, tyrannical, bureaucratic federal control, the Department of Health, Education, and Welfare knows no equal or superior... If the federal government in all its wisdom decides that money should be spent to provide opportunities for a particular group of people, that government should be willing to spend its own money for such purposes and not require the private educational institutions to use their limited funds for such purposes...."[30] Barnes v. Converse College is presently being appealed under the constitutional provision which forbids appropriation of private property for public purposes without recompense, the Fifth Amendment.

The regulation's wording would seem to imply that means other than interpreters could be used to convey information to hearing impaired students. In Crawford v. University of North Carolina, the plantiff is objecting to a United States Magistrate's finding that compliance with the Section 504 mandate could be accomplished with auxiliary aids other than interpreters.[31] Obviously, the key problem here is cost. Interpreter services range between $3.50 per hour for a student-intern interpreter to $8.50 an hour for a highly skilled and experienced interpreter.[32] Since interpreting is very tiring, interpreters usually work in pairs. Therefore, it is easy to ascribe a cost of approximately $1,000 to providing interpreter services for a three credit hour course. The Division of Vocational Rehabilitation Services can sometimes provide direct service money for interpreters, although this is not always their procedure.[33] In the Barnes case, the South Carolina Vocational Rehabilitation Agency decided that since Ms. Barnes was already employed, she had no further need for rehabilitation. Thus, she was denied funding support for interpreter services.[34]

Experts seem to agree that interpreters are the most basic, most essential support service necessary for deaf students to accomplish college work.[35] While the litigation picture is anything but clear, it is the author's opinion that colleges and universities will be required to provide interpreter services, nonavailability of funding from other sources notwithstanding. However, the financial impact may not be as drastic as one might suppose. First, deafness is a low incidence handicap. There are about 7.5 deaf for every 10,000 hearing American high

school students.[36] Additionally, only about 5% of deaf youths who leave school at age 16 or older have a tenth grade educational achievement level.[37] And, for the average deaf student, more support services than the minimum required by Section 504 will be required. Thus, many deaf college students will prefer attendance at special regional programs for the deaf.[38] Gallaudet College identified 43 such programs in 1975.[39] Therefore, the author would advise New Jersey colleges and universities to prepare for the provision of interpreter services, but on a rather limited basis.

Next to interpreters, notetakers are considered the most important auxiliary aid for deaf students.[40] Individual notetaking presents difficulty to most deaf students since they are visually concentrating on the interpreter. Notetaking can also be required for quadraplegic students or others with major motor difficulties. Blind students too may have difficulty since taking notes with a braille slate or with a Perkins Brailler is a noisy and potentially distracting process. Providing notetakers is not an auxiliary aid specifically mentioned under Section 84.44(d) of the regulation. However, the service is provided at a good number of institutions throughout the country.

Probably the simplest solution is merely to encourage the disabled student to find a classmate who takes good notes and ask for carbon copies. This solution has been deemed practical by disabled activists in hearings before the Congress.[41] The problem can be ameliorated for certain disabled students by allowing them to record lectures on cassette tape machines. Section 84.44(b) forbids prohibition of tape recorders in classrooms for notetaking. In the author's opinion, if these two simple

practices were facilitated, the basic requirement would be met. Some institutions go further. For example, some train notetakers, others set up registries with mandatory qualifications of grade point average or major. These procedures seem of questionable value. Notes reflect the value systems and conceptual, cognitive experience of the notetaker.[42] Their use to another person is, at best, limited. The author sees no reason to engage in esoteric solutions when there is no definitive proof that the pedestrian is less effective.

We will next discuss auxiliary aids in the context of course examinations. Section 84.44(c) requires alternate testing as necessary to accurately measure the achievement of disabled students. To the degree possible, the author believes this problem should be left to the individual disabled student and the professor. Orientation to potential problems and sensitivity sessions would, of course, be valuable to faculty members. The problem of the student who cannot write or cannot adjust the microscope because of some temporary disabling condition is not new to college faculty members; they have been coping with it for many years. We, therefore, see no reason to superimpose another system. What is necessary, and what probably should be the function of a small, centralized office for disabled student services, is the provision of interpreter, reader, and amanuensis services, when requested. The centralized office could also act as a facilitator should difficult circumstances arise.

Housing

Section 84.45 covers student housing. If an institution provides

housing to its nonhandicapped students, it must provide comparable, convenient, and accessible housing to its handicapped students at the same cost. If architectural modifications are required to meet this mandate, the institution's transition plan should outline steps for completion as soon as possible, but not later than June 3, 1980. By that time, housing for the disabled should be available in sufficient quantity and variety so that accommodations, as a whole, for disabled students are comparable to that of the nondisabled.

What is an appropriate quantity for accessible housing? What percentage of dormitory units need to be barrier-free? For new construction in New Jersey, 4% of all residential dwelling units in a multi-dwelling project must be barrier-free.[43] The nationally prevalent BOCA Code uses the same figure.[44] The author served on the committee which developed the New Jersey Administrative Code on barrier-free design and can state, from personal experience, that the 4% figure was very controversial. It was based not on the percentage of disabled persons requiring barrier-free accommodations in the population, but rather on that percentage coupled with a factor of availability. (An entrepreneur cannot be required to hold a barrier-free dwelling unit unoccupied waiting upon rental by a disabled tenant.) Based only on statistics of the incidence of severe mobility limitation in the general population, a 1-2% figure would be appropriate.[45] If an institution's transition plan involved the construction of new housing, the 4% guideline dictated by the New Jersey Administrative Code must, of course, apply. For modification of existing housing, however, a figure closer to

2% might be decided upon. Keep in mind that modifications for accessibility do not make a dwelling unit any less useable by the able-bodied. At least as important as percentages is the provision of a reasonable variety of accommodations for disabled students. Segregation must be avoided.

While not mandated in the Section 504 Regulation, the author feels any campus plan for housing the disabled must consider social aspects as well as accessibility of dwelling units. Therefore, minimal modifications to make it possible for disabled students to visit their nondisabled peers are of great significance. The psychological problems of segregating disabled people into special, separate environments has been well documented by the Harrises and others.[46] The text Architectural Accessibility for the Disabled of College Campuses, prepared by the State University of New York, when closely referenced to New Jersey Administrative Code, provides excellent data on barrier-free design pertinent to the college or university housing.[47]

The section on housing also requires that universities which assist with obtaining off-campus housing assure that such housing is, as a whole, available to handicapped students. This has two ramifications. First, renters who would discriminate on the basis of handicap may not be listed. Procedures which should already be in being to implement Section 86.32 of the Title IX Regulation can be expanded to cover the handicapped and adequately fulfill this requirement. Second, if the university surveys and provides information on off-campus housing units, information

on accessibility should be included.

Many disabled persons are unable to live alone without attendant care. The regulation is quite explicit that the cost of such care is not the responsibility of the university. Some universities, however, do provide training for attendants and a referral service. Should a university decide to provide such referral service, the author recommends that hiring, firing, and reimbursement be handled completely between the disabled student and the attendant. Any other arrangment impresses us as unnecessarily paternalistic.

Financial Aid

Section 84.46 is a very straight forward discussion of financial aid. Colleges and universities must operate their aid program in a nondiscriminatory manner. On the whole, scholarships must be equally available to handicapped and nonhandicapped students. This "on the whole" concept allows for continuation of discriminatory provisions in wills and trusts, provided they are compensated for by other portions of the aid program. Athletic scholarships may be limited to those who possess the required physical prowess. A paraplegic could certainly be denied a football scholarship; however, it would be discriminatory not to allow a deaf student to compete for a diving scholarship. Student employment opportunities must also be non-discriminatory; the "reasonable accommodations" principle of Subpart B applies. If the college provides an employment placement service for its students, the opportunities offered must, on the whole, be available to both handicapped and

nonhandicapped students. This should present little problem, since the vast majority of employers are covered under either Section 503 or 504 of the Rehabilitation Act or the New Jersey Law Against Discrimination.

Nonacademic Services

Section 84.47 covers nonacademic services. The section has three subparts: 1) Physical Education and Athletics, 2) Counseling and Placement Service, and 3) Social Organizations.

If a college offers physical education courses, it must offer such courses to both handicapped and nonhandicapped students. Separate physical education classes for handicapped students are permitted only when it can be clearly shown that separation is a requirement to provide equal benefit. For the majority of the disabled, the regular physical education curriculum, with necessary adaptations and modifications, should suffice. There has been a tremendous growth in the field of providing athletic and recreation opportunities for the disabled. Today, the mobility-limited play wheelchair basketball, participate in all variety of track and field events, and bowl in both special and integrated leagues. Paraplegics now routinely participate in the Boston Marathon and several have been involved in attempts to swim the English Channel. It is now no longer unusual to see the blind person or the amputee on the ski slopes. Wheelchair tennis is growing in popularity. The body of literature on adaptation of equipment and modification of goals is growing rapidly. The author offers the following as possible resource organizations:

1. Information and Research Utilization Center

American Alliance For Health, Physical Education, and Recreation (AAHPER)
1201 Sixteenth St. North West
Washington, D.C. 20036

2. The National Wheelchair Athletic Association
40-24 62nd St.
Woodside, New York 11377

3. The American Athletic Association for the Deaf
7225 Ferguson Rd.
Dallas, Texas 75228

4. Association for Education of the Visually Handicapped
919 Walnut St.
Philadelphia, Pennsylvania 19107

5. Committee on Recreation and Leisure
President's Committee on Employment of the Handicapped
Washington, D.C. 20210

If a college sponsors intercollegiate or intramural athletics, it must provide equal opportunity for the disabled to participate in these activities. This means that disabled students must not automatically be precluded from participation. A deaf student should certainly be allowed the opportunity to try out for the diving team or the wrestling team. A student who uses a wheelchair could certainly try out for archery or swimming. The Section 504 Regulation does not require a college to set up special athletic teams for the disabled. However, the college must view the formation of a wheelchair basketball team using the same criteria it would use for the establishment of any other team.

The section on counseling warns colleges and universities not to counsel disabled students toward more restrictive career objectives. This does not, however, preclude the counseling department from providing a student with factual information concerning obstacles that a disabled individual might encounter in the licensure or certification processes. The counseling department must use the same care in selection and

administration of tests as has previously been discussed concerning admissions. Tests must measure the parameter they are intended to, not the physical limitations of the student.

Subpart E ends with a statement that colleges and universities must not allow fraternities, sororities, or other organizations to which they grant support to practice discrimination in their rules for membership.

Program Administration

The Section 504 Regulation does not require the establishment of a separate office to handle the affairs of disabled students. Most colleges and universities, however, do set up such an office. The author recognizes that the scope of responsibility of these offices varies tremendously from university to university. The University of Illinois at Champagne-Urbana has a Rehabilitation-Education Center, which provides a wide range of direct services to the disabled students. The University of New Orleans, in cooperation with the Louisiana Human Resources Administration, operates a "Rehabilitation Center" for its quadraplegic students.[48] The author feels it necessary to express the opinion that such ornate, large scale efforts are not required by the Section 504 Regulation and, in the minds of some, are unneccessary and counterproductive. The University of Illinois program for example has been characterized as "...a mecca of custodial, paternalistic, well-intentioned discrimination...."[49] On the other hand, disabled students frequently come from highly protective family environments and highly supportive, special education schooling experiences. Therefore, one must draw a fine line between meeting realistic needs and creating

another sheltered environment fostering dependence and unrealistic expectations. The author would tend toward keeping any office for disabled students services very small and would not involve it in the provision of any direct services. The office would provide information, but the services would come from the appropriate department within the university. The disabled student would, in general terms, be expected to make his own arrangements just as the nondisabled student is. If he or she requires an academic waiver or modification, the student should make arrangements with the professor, department head, or dean. If the student desires on-campus employment, he or she should make arrangements with the student employment office. However, at least at the beginning, there is probably a necessity for the office of disabled students services to act as a form of ombudsman for its clients. However, it should view this role as transient, attempting to acclimate the faculty and staff to providing appropriate services to disabled students as a matter of course. In other words, the office of disabled student services should be working toward putting itself out of a job.

Other Services

The Section 504 Regulation gives guidance on the majority of services and activities in the university environment. However, should a university provide any additional services, they must also be provided in a nondiscriminatory matter. One example is transportation; many large universities provide on-campus bus service. Should this be the case, the university is obligated to provide service to its disabled students. The

question of totally accessible bus systems versus "Paratransit" systems is extremely complex and is under litigation in several courts.[50] Until the question is settled, a university certainly could provide equivalent services through a paratransit system.

Some universities accomplish this on a scheduled basis, others on a demand basis. The author has no specific recommendations in this area other than that system design should be accomplished by the university's office of transportation assisted by its disabled clients. This is not, in the author's opinion, a job for the office of disabled students services. Looking to the future, it may be appropriate for college transportation departments to investigate "Transbus" type vehicles. These buses, with lowered floors and extending ramps, are designed to provide normal, mass transit service to both disabled and nondisabled riders.

DISCUSSION QUESTIONS

1. An individual exhibits very disruptive behavior in class due to excessive drinking. The student claims such behavior must be overlooked since it is based upon the handicap of alcoholism. Is the student correct?

2. A university has an open admissions policy. A deaf student is found to be having significant difficulties with Freshman English and is found to have a fifth grade reading level. The student demands extra tutorial assistance at the university's expense. The student claims his lowered reading level is a result of his handicap. Must the university provide such assistance?

3. A student has considerable speech impairment due to cerebral palsy. The student desires to take French as a humanities elective. The French Department refuses, stating that one of their objectives is to teach spoken language. Is the university obligated to make a course modification?

4. Can mobility-limited students petition a university administration for support of a wheelchair basketball team. The university engages in various intercollegiate sports and has intramural programs. Must the university sponsor the team?

5. A college admits physically handicapped students to its teacher training program. It routinely arranges the internship programs for them at various special schools for disabled students. Is this a permissable activity?

6. A university has set aside 4% of its student housing for mobility-limited students. The housing is quickly filled by handicapped upperclassmen. Must the university make additional housing accessible to accommodate the mobility-limited among the incoming freshman class?

7. A professor absolutely refuses to allow blind students to tape record his lectures. He claims that his property rights are being infringed; he desires to use the lectures as the basis of a forthcoming book. What action should the university take?

8. A university determines not to modify its physical facilities until a disabled student applies and is accepted. Is this an acceptable practice under the Section 504 Regulation?

9. A university determines it will not provide interpreters for the deaf. It will, however, allow deaf students to attend classes and obtain all they can through lipreading. It will also provide them all course materials supplied to those who take the courses by correspondence. Does this satisfy the requirements of the Section 504 Regulation?

10. A college uses a nearby bowling alley for a physical education course. A student who uses a wheelchair signs up for the course but finds the bowling alley is inaccessible. The student requests the course be moved to an accessible alley. The university refuses stating that bowling is not a required course and that the student should make another selection. Is the university justified in their position?

11. A blind student applies for housing at a university. The university refuses, stating that it has until June 1980 to make its housing available to the disabled. Is the university correct in its interpretation?

12. A university has several campuses in the northern section of the state. It determines to make one of these campuses accessible to disabled students and concentrate them there. Is this an acceptable practice?

13. About one-half of the housing on a particular university campus is in fraternity and sorority houses. The houses are owned by the university but maintained by the fraternity or sorority. Must these houses be included in the university's transition plan?

14. A university library is two-story and is not serviced by an elevator. In its transition plan, the university states that it will not install an elevator but rather will provide mobility-limited students with any book they desire from the upper floor upon request. Does this constitute reasonable program accessibility?

15. A university determines to add a vocational counseling service to its office of disabled student affairs. Is this an appropriate addition?

16. A severely disabled student requires an attendant for activities of daily living. The student desires the attendant to live with her in campus housing. The attendant is not a student of the college. Must the college allow the attendant to live in campus housing?

17. A paraplegic student requests a university infirmary to assist him with changing and irrigating his catheter. The infirmary refuses, stating it is available for emergency services only. The student counters that the university is denying "reasonable accommodation" to his handicap and threatens to file a claim of discrimination under Section 504 with the Office for Civil Rights. Is the student correct?

18. A deaf student desires to take an English course from a particular professor. The university refuses her, directing her to another section of the same course taught by another professor. The university is already providing interpreter services in that section and does not wish to hire two interpreters for the same course. Is the university's position justifiable?

19. A university has the following question on its admission application: "If there are any emotional or psychological problems that you feel we should we know about in order to advise and help you towards your educational goals, please explain." Does this question violate the Section 504 Regulation?

20. A college provides karate courses on a noncredit basis to its students free of charge. A student who uses a wheelchair applies and is denied admission. Is the university justified in such denial?

21. A college sponsors a lecture series on current affairs for its students. Must it provide interpreters for the deaf at these lectures?

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CHAPTER IX

HEALTH, WELFARE, AND SOCIAL SERVICE PROVIDERS

Subpart F of the regulation implementing Section 504 of the Rehabilitation Act of 1973 covers health, welfare, and other social service providers. It constitutes Sections 84.51 to 84.54 of the regulation. In this chapter, we will discuss the history of rulemaking as it pertains to health, welfare, and social service providers; discuss the impact of Subparts A, B, and C of the regulation; and delineate, in detail, the requirements of Subpart F.

HISTORY OF RULEMAKING

On May 17, 1976, the Department of Health, Education and Welfare, published a Notice of Intent to Issue Proposed Rules.[1] A draft proposed regulation was attached to the Notice and public comment was solicited on 15 issues which had been identified as critical. Three of these issues are of particular significance to our present study: 1) Whether drug and alcohol addicts or homosexuals should be included within the definition of "handicapped," 2) Whether the regulation should concern itself with patients' rights to receive treatment and fair compensation for work, and 3) Whether the size or resources of a provider should be allowed to affect obligations for compliance.

Drug Addicts and Alcholics

Over 300 written comments were received in response to the Notice of Intent. Additionally, the Office for Civil Rights held ten meetings across the country designed to solicit inputs. On July 16, 1976, the

Department of Health, Education, and Welfare published a Notice of Proposed Rulemaking.[2] This promulgation analyzed comments received on the critical issues identified in the Notice of Intent. The question of including drug addicts, alcoholics, and homosexuals within the definition of "handicapped" elicited a great number of comments. The overwhelming majority urged that the conditions be excluded. Arguments made by commenters were: That these conditions are self-inflicted; that Section 504 is not the proper vehicle for eliminating discrimination based on these characteristics; that the term "handicapped" does not, from either a historical or popular viewpoint, include addicts or homosexuals; that such persons, and particularly homosexual persons, would not agree that they are handicapped; and that inclusion of these groups would detract from the emphasis upon elimination of discrimination against those persons traditionally thought of as handicapped.

Based on comments received, the Department ceased any consideration of defining homosexuals as handicapped persons. However, to quote the promulgation, "...because both medical and legal opinion define addiction as an illness and because there has been extensive congressional debate and consideration of this issue with respect to various programs administered by this Department, it is the view of the Department that [drug and alcohol] addiction is clearly within the statuatory definition...."[3]

Response to the Notice of Proposed Rulemaking was heavy. A total of 750 comments were received and, additionally, 22 public meetings were held across the country. The final Section 504 Regulation analyzed comments from the Notice of Proposed Rulemaking.[4] The promulgation

acknowledges that, as during the first comment period, the issue of whether to include drug addicts and alcoholics was of major concern. The regulation, however, makes no change from the Department's earlier position. In the interim, HEW had obtained a legal opinion from the Attorney General that drug addiction and alcoholism are "physical or mental impairments within the meaning of Section 7(6) of the Rehabilitation Act." HEW's position, therefore, is that they are without authority to exclude these conditions from the definition. Additionally, they point out that while Congress did not focus specifically on these problems when enacting Section 504, the committees were undoubtedly aware of HEW's long-standing practice of treating drug addicts and alcoholics as individuals eligible for services under the Vocational Rehabilitation Act.

Later in this chapter we will focus particular attention on the implications of the inclusion of drug addicts and alcoholics as "handicapped persons" for health, welfare, and social service providers. Subpart F contains a specific section on the subject. However, before we leave our present discussion of this subject, some indication of its continued controversial nature seems in order. The Congressional Record of March 7, 1978 includes remarks by Representative Henry J. Hyde of Illinois on the subject.[5] Hyde speaks of the fears held by chain drug corporations that the Section 504 Regulation "...will substantially increase the possibility of drug diversion from their warehousing facilities." He asks, "....Will mass transit systems be required to accept addicts as bus drivers and motormen?" Mr. Hyde has introduced a proposed amendment to the Rehabilitation Act which would have the effect

of excluding drug addicts and alcoholics from the definition of "handicapped persons."

Patients' Rights

The second area identified as a critical issue in the Notice of Intent promulgation was whether the regulation should contain provisions concerning patients' rights to receive or refuse treatment and to receive compensation for work done. The proposed regulation appended to the promulgation did not attack these questions but they seemed of sufficient current relevance to warrant consideration. Both had been identified as issues for concern by the White House Conference on Handicapped Individuals.[6] The question concerning payment for patient labor became somewhat academic when the Department of Labor promulgated a regulation under the Fair Labor Standards Act.[7] DOL's promulgation was based on the decision in Souder v. Brenner, in which the utilization of patient labor without compensation was held to be unconstitutional.[8]

The Department, in its Notice of Proposed Rulemaking promulgation, expressed the opinion that rules on an institutionalized person's right to receive or refuse treatment were beyond the authority of Section 504. The final regulation, therefore, contains no guidance on this subject. The courts, however, have cited Section 504 in several cases regarding institutionalized handicapped persons which are of sufficient significance to discuss here.

The tone for developments in this area was set in Wyatt v. Stickney.[9] After analyzing conditions at the Partlow State School, Judge Frank Johnson issued the following order: "No person shall be

habilitation setting feasible for that person."[10] New York's Willowbrook State School case is an excellent example of the principle.[11] The consent decree, which is part of the court's order settling this case, mandated a reduction of the institutional population from 5,700 residents to 250 residents within six years. In New Jersey, a similar consent decree has been signed affecting the Greystone Park Psychiatric Hospital.[12] New Jersey Public Advocate Stanley C. Van Ness has characterized the consent order as "...the broadest decision ever on behalf of psychiatric patients in the state and most likely the furthest reaching of any such case in the country...."[13]

With relation to patients' rights and Section 504 of the Rehabilitation Act, the most significant litigation to date is Halderman v. Pennhurst.[14] In this far reaching decision, Justice Raymond Broderick held that: "When a state involuntarily commits retarded persons, it must provide them with such habilitation as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capabilities permit...."[15] Justice Broderick further held that: "...Minimally adequate habilitation can not be provided in an institution such as Pennhurst...."[16] In a section of his decision entitled "Federal Statuatory Right to Non-Discriminatory Habilitation," Justice Broderick referred to Section 504 as a codification of the constitutional right to equal protection for the handicapped. He further found "...that under Section 504 unnecessarily separate and minimally adequate services are discriminatory and unlawful. On the basis of this record, we find that the rights of the retarded at Pennhurst under Section 504 of the Rehabilitation Act of 1973 have been and are being violated."[17]

Obviously, the mere emptying of institutions such as Pennhurst is not the end of the picture. To quote David Ferleger, an attorney for the plaintiff, "We did not intend to be satisfied by an end to beatings and abuse, or even by the addition of furniture, decorations, and activities. We wanted what the courts have called the least restrictive alternative form of care. Pennhurst could not provide it. At the same time, we did not want people dumped into inadequate community centers."[18]

Clearly, decisions such as Pennhurst necessitate comprehensive planning. Vitelio has done an exhaustive search of the literature to prove that hospital-like settings are appropriate for certain mentally handicapped persons.[19] Additionally, the problem of lack of viable community alternatives must be met. Several litigations have confirmed the requirement for the state to affirmatively create such alternatives. A quote from one seems most appropriate:

> It is not for this court of three lay judges to choose the most appropriate, less drastic form of care for each of these children...It is however, for this court to order the defendants to proceed as expeditely as is reasonably possible (1) to provide necessary physical resources and personnel for whatever non-hospital facilities are deemed by them to be most appropriate for these children, and (2) to place these children in such non-hospital facilities as soon as reasonably appropriate. The defendants shall further spend such money of the State of Georgia as is reasonably necessary to provide such non-hospital facilities and personnel and to place these children in such non-hospital facilities.[20]

EFFECTS OF SUBPART A, B, AND C

In addition to Subpart F, health, welfare, and social service providers must also comply with the more general provisions of Subparts A, B, and C. In the next section, we will discuss the most salient, particular portions of these subparts.

Subpart A, General

The definition of recipient under Subpart A has been somewhat controversial with respect to Medicaid vendors. In the initial Notice of Intent, individual vendors were not included.[21] Reaction to this was decidedly negative and the Notice of Proposed Rulemaking changed the approach and included them.[22] Of course, as is clearly pointed out in the promulgation accompanying the final regulation, the term recipient does not apply to those providing services under Part B of Title XVIII of the Social Security Act (Medicare). Medicare is a contract of insurance or guarantee and, thus, falls within an exemption from the regulation. Additionally, no federal financial assistance flows directly from HEW to the Medicare practitioner, since Medicare is basically a program of direct payments to beneficiaries.[23]

A second item of concern regarding Subpart A is the responsibility of primary grantees to secondary grantees. What, if any, responsibilities does the primary grantee have toward checking the compliance of the secondary grantee with Section 504? The question has particular relevance between state government agencies and local agencies. In its commentary accompanying the promulgation of the Section 504 Regulation, HEW touches on this question. They state the belief that "...the possibility for federal-state cooperation in the administration and enforcement of Section 504 warrants further consideration."[24] Hence, pending further rulemaking, the Section 504 Regulation gives us no direct clue to the degree of involvement required. The author, therefore, has gone to procedures for the implementation of Section 503 to obtain what seems to be a reasonable,

media via, approach. Section 503 is administered by the Office of Federal Contract Compliance Programs. The office does not, itself, review all federal contracts; rather, it requires other contracting agencies to perform pro forma compliance reviews prior to contract award. These reviews include checking such items as posting of notices, appointment of responsible officials, and formulation of Affirmative Action Plans.[25] Relating this to the Section 504 arena, the author recommends that recipients, such as state agencies, check compliance of secondary recipients with respect to: (1) Notification of employees and beneficiaries of policy not to discriminate on the basis of handicap, (2) Appointment of a responsible official to coordinate compliance and handle grievances under Section 504 in accordance with an established, due process procedure, (3) Completion and filing of a Transition Plan, and (4) Completion of a self-evalution document. Of course, each secondary recipient should have submitted its Assurance Form, HEW Form 641.

Subpart B, Employment

Health providers have seemed particularly concerned that the inclusion of drug addicts as handicapped persons will have an adverse affect upon their control of dangerous substances.[26] They fear the possibility of drug diversion, if forced to hire persons with a history of drug abuse. The author feels such fears are unfounded, since drug addicts may be subjected to the same rules of behavior as other employees. For example, employers may enforce rules prohibiting the possession or use of drugs in the workplace. Additionally, they may hold a drug addict to the same standard of performance and behavior to which they hold other employees, even if any unsatisfactory behavior is related

to the drug addiction. Also, in making employment decisions, a recipient may judge a drug addict on the same basis it judges all other applicants; past records including absenteeism, disruptive, abusive, or dangerous behavior may be considered. It is not required that the manifestations of drug addiction be ignored in making decisions to hire or continue the employment of drug addicts.

Subpart C, Program Accessibility

Section 84.22(c) modifies the program accessibility portions of Subpart C with regard to small health, welfare, or social service providers; those with 15 or less employees. If providing program accessibility would require making significant facility alterations, a small provider may, as an alternative, refer handicapped persons to other providers whose services are accessible.

Contrasted to the relative leniency afforded to small providers in the Section 504 Regulation is the distinct feeling on the part of the handicapped population that health, welfare, and social service providers should be examples of full accessibility for other recipients.[27] Particularly with regard to services directly affecting them, the disabled desire normal, not special, methods of treatment. The author, therefore, advocates special emphasis on such items as providing adequate parking spaces, providing accessible entrances and rest rooms, and providing interpreter and reader services at locations such as vocational rehabilitation facilities, work activity centers, rehabilitation hospitals, etc.

SUBPART F

Subpart F comprises Sections 84.51 through 84.54 of the Section 504 Regulation. Section 84.51 defines the applicability of the subpart; it applies to all health, welfare, and other social services programs that receive or benefit from federal financial assistance.

Section 84.52

This section contains four subparagraphs. Subparagraph (a) is an enumeration of various types of discriminatory behavior. In general, a recipient may not deny a qualified handicapped person its benefits or services, may not provide benefits or services that are not equal to those offered nonhandicapped persons, may not provide services in a manner which limits the participation of qualified handicapped persons, or may not provide different or separate services to handicapped persons except when necessary to achieve equal benefits. There has been some confusion concerning this section. It is not the intention to forbid programs for persons of a particular handicap group. It is perfectly legitimate to run a day care center for persons with cerebral palsy. However, it would not be legitimate to exclude a person with cerebral palsy from that day care center because the person is also blind. A burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Subparagraph (b) of Section 84.52 concerns assuring that handicapped persons are not denied benefits because of impaired sensory skills. For example, if a recipient advertises its services on television, it should also advertise its services on radio for blind persons and on billboards for deaf persons. Concentration in a media which would exclude one class of handicapped persons could be considered a discriminatory practice. Additionally, recipients must assure that their office procedures for handling handicapped clients take impaired sensory skills into consideration.

Subparagraph (c) requires hospitals to provide a method for communication with the deaf when providing emergency health care. Interpreters for the deaf seem to be the most reasonable solution. While the regulation does not specifically identify interpreters or preclude use of other means, the author believes the provision of one individual trained in sign language on every shift is by far the most appropriate method. The National Center for Law and the Deaf is currently pursuing litigation to assure that interpreters are determined to be the only appropriate method for fulfilling communication requirements with the deaf as mandated under Section 504.[28]

Subparagraph (d) speaks further to the question of auxiliary aids. Recipients who employ fifteen or more persons must provide such aids as brailled and taped material or interpreters, when necessary to afford blind and deaf clients an equal opportunity to benefit from the service being offered. Assistance in filling out forms should also be provided to blind persons and those with mobility limitations affecting their upper extremities. The regulation does not address itself, specifically, to the

question of teletypewriters for the deaf, TTYs, but this is a question of considerable concern. The Architectural and Transportation Barriers Compliance Board, established under Section 502 of the Rehabilitation Act, has recently cited the Office for Civil Rights in the Department of Health, Education, and Welfare for not providing such service for deaf clients.[29]

Section 84.53, Drug and Alcohol Addicts

This section forbids hospitals and outpatient clinics from discriminating in admission or treatment against a drug or alcohol abuser who is suffering from a medical condition. This does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. However, a cancer clinic may not refuse to treat cancer patients because they are also alcoholics. This section is essentially a reiteration of law contained in the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581).

Section 84.54, Education of Institutionalized Persons

This section requires that persons who are institutionalized receive appropriate education. The same standards of least restrictive placement which apply elsewhere, apply in the case of institutionalized persons. In New Jersey, such education is handled through the Garden State School District. This district runs special educational facilities on the grounds of various institutions. Whether such a procedure will continue to be considered valid in light of Public Law 94-142 and

Section 504 is a matter for the future. However, it is clear that programs for deinstitutionalization must also provide for adequate educational services in the community.

DISCUSSION QUESTIONS

1. My agency runs a number of small offices located throughout the state, each with fewer than 15 employees. Must I comply with program accessibility or may I refer clients to other agencies with accessible facilities? Must I provide auxiliary aids such as interpreters or readers?

2. My agency operates a sheltered workshop. May I require clients who are drug addicts to enroll in a program of drug rehabilitation as an entrance requirement to my sheltered workshop program?

3. My hospital does not provide emergency health care services. Must I have an interpreter on duty at all times?

4. We purchase hearing aids and orthopedic appliances for our clients. Must we assure that the vendors from whom we purchase comply with Section 504?

5. We operate a neighborhood health clinic and receive a good deal of our income through Medicaid. We keep a great deal of medicine, including narcotic substances, on the premises. A drug addict has applied for a job here. His past employment record includes dismissals for absenteeism and theft. He claims we can not consider his past record for employment purposes since the problems are as a result of his handicap, drug addiction. Is his interpretation correct?

6. We operate a large scale rehabilitation hospital specializing in severely orthopedically handicapped children. A mentally retarded boy who was severely injured in an automobile accident has been referred to us. Our physicians tell us he is an inappropriate candidate for our services since his mental retardation will preclude his full cooperation in the rehabilitation process. Can we deny this boy admission?

7. My agency is involved with the adoption of children from foreign countries. We do receive federal aid in the form of CETA personnel. We are located in a downtown urban setting but we lease, rather than own, our building facilities. These facilities are not accessible to mobility-limited persons. May we force our landlord to make required modifications to achieve program accessibility?

8. I am a handicapped person who receives benefits under the Medicaid program. I require the services of a urologist. I find, however, that there is no urologist with an office accessible to me within a 50 mile radius of my home. With whom can I register a complaint?

9. We operate a sheltered workshop for the mentally retarded. A blind person, who is not mentally retarded, has made application for our services. Under Section 504, must we accept this blind person?

10. I have made all portions of my facility which are used for client services program accessible. Must I also consider portions of the facility where only my professional staff works?

11. I operate a community recreation program partially funded by a grant from the New Jersey Department of Education. During the summer, we provide playground activities for local children. The parents of a girl who uses a wheelchair for mobility are attempting to sign her up for a swimming class. Must we accept her?

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CHAPTER X

SPECIAL POPULATIONS

In the first nine chapters of this work, we have attempted a relatively detailed explanation of Section 504 of the Rehabilitation Act of 1973, its implementing regulation, and other legislation and code which interface with it. Our method, like that of the implementing regulation, has been to categorize by the type of provider. Clearly, another method would have been possible, categorization by type of disability. In this chapter, we will attempt such a breakdown.

The author has found a relative dearth of scholarly information on Section 504 and its implementing regulation. Commentary related to specific disability groups is particularly scanty. To delve deeply into this area for each major disability group is clearly beyond the scope of this work. The author recommends such studies as worthy of future effort by other investigators.

ALCOHOLISM AND DRUG ADDICTION

The question whether alcoholics and drug addicts should be considered "handicapped persons" in the context of Section 504 of the Rehabilitation Act has been controversial from the very beginning. In its Notice of Intent promulgation, May 17, 1976, the Department of Health, Education, and Welfare requested public comments on a number of key issues.[1] One specific issue was whether drug and alcohol addicts should be included within the purview of the regulation. Public comments were summarized in the Notice of Proposed Rulemaking, July 16, 1976.[2] To quote from the introductory statement to the promulgation: "...the

overwhelming majority of comments on this issue urged that...addiction be excluded...."[3] The primary arguments made by commentors may be summarized as follows: 1) "That these conditions are self-inflicted; 2) that Section 504 is not the proper vehicle for eliminating discrimination based on these characteristics; 3) that the term handicapped person does not, from either a historical or popular viewpoint, connote addicts; 4) that inclusion of these groups would detract from the emphasis upon eliminating discrimination against those persons traditionally thought of as handicapped; and 5) that educational programs would be disrupted by the inclusion of addicts.

Despite these comments, the Department remained firm that drug and alcohol addicts should be included. It maintained that both medical and legal opinion defined addiction as an illness. However, in an obvious attempt to allay public fears, it included the following caveat: "...The fact that these persons are included does not mean that their condition is not to be considered in determing whether they must be provided services or employment opportunities. With respect to the employment of addicts...if it can be shown that the addiction...prevents successful performance of the job, the person need not be provided the employment opportunity in question...."[4]

A second comment period followed the Notice of Proposed Rulemaking. As during the first comment period, the issue of inclusion of drug addicts and alcoholics drew many comments. These comments were summarized in the analysis accompanying the promulgation of the final regulation,

May 4, 1977.[5] The preponderance of commentors called for exclusion of the groups. The Department, however, remained firm and also announced that it had obtained a legal opinion from the Attorney General. The opinion concluded that drug addiction and alcoholism are "physical or mental impairments" within the meaning of Section 7(6) of the Rehabilitation Act of 1973 and that drug addicts and alcoholics are, therefore, handicapped for purposes of Section 504, if their impairment substantially limits one of their major life activities.[6] The Department, however, admitted that "...application of Section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement."[7]

In a further attempt to allay fears, the analysis includes further interpretation of Section 504 with regard to the addict and employment. It states: "For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider--for all applicants including drug addicts and alcoholics--past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violation of rules and unsatisfactory work performance...."[8] The author considers this a fatal flaw. The regulation gives no consideration to the alcoholic or addict who has been rehabilitated; he or she may still be judged on the basis of past performance when the handicap was in an active stage. To quote Mr. Willie J. Lynch, Jr., Chairman of the Washington Area Council on Alcholism and Drug Abuse: "This lack of distinction strikes at the heart of alcholism and drug addiction as handicaps, and the 504 regulations appear to perpetuate the possible

areas of discrimination. For example, a prospective employee, or one being considered for promotion, may have a personnel record which indicates a history of absenteeism, disruptive behavior, violation of rules and unsatisfactory work performance. This history is, indeed, symptomatic of impairment. However, if the individual has recovered, the behavior pattern is, in most instances, irrelevant. The handicap has become history itself, and not the behavior."[9]

The analysis accompanying the final promulgation states that there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. Additionally, some addicts and alcoholics have been denied emergency treatment. These practices are prohibited by the Drug Abuse Office and Treatment Act of 1972 and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970.[10] Both these statutes are administered by the Office for Civil Rights of the Department of Health, Education, and Welfare. The Section 504 prohibition against denying medical services to alcoholics, Section 84.53 of the implementing regulation, adds another weapon to HEW's arsenal.

With regard to social services, providers may not exclude persons solely by reason of the presence or history of alcoholism or drug addiction. They may, however, be excluded if manifestations of the condition cause substantial interference with the operation of the program. Thus, Section 504 has little impact on the provision of social services for the practicing alcoholic or drug addict.

Mr. Lynch makes a very telling point concerning the provision of services to alcoholics or drug addicts who are also physically

handicapped. Small providers, those with less than 15 employees, are not required to provide auxiliary aids to persons with impaired sensory, manual, or speaking skills, nor are they required to make extensive modifications for program accessibility. (See Sections 84.52(d) and 84.22(c).) Since most service activities for alcoholics and addicts employ fewer than 15 people, they are "...automatically exempted from the requirement of making their services available to individuals who are deaf, confined to a wheelchair, or otherwise handicapped...."[11]

In the author's opinion, the Section 504 Regulation is remarkably deficient with respect to the alcoholic and drug addict. It offers little help to this class of handicapped persons in obtaining their rights. Nevertheless, there is continuing public outcry to remove these classes from the definition of handicapped persons. Representative Henry J. Hyde of Illinois has introduced legislation to this effect.[12] On the floor of the House, he expressed the hope that Congress would "...thoroughly explore the problems created by mandating Affirmative Action with regard to drug abusers and alcoholics. The problems are varied and complex and require sensitive and prompt study before the heavy hand of Government mandates solutions that may well be worse than the problem."[13]

EPILEPTICS

Epilepsy is a symptom, not a disease, which affects four million people in the U.S., or about one out of every 50 persons. Epilepsy is as common as diabetes and twice as prevalent as stroke. It affects more people than cancer, cerebral palsy, multiple sclerosis, muscular dystrophy, and tuberculosis combined. It is not an emotional,

psychological, or social disturbance. The symptomatic "seizure" is a sign indicating that part of the brain may have been injured at some time by a blow, an infection, a stopped-up blood vessel, or the after effects of lack of oxygen at, or following, birth. Some cases are of unknown etiology. Approximately 50% of persons with epilepsy have their seizures completely under control through the use of medication, while another 30% have minimum effects from their condition.[14]

As with other handicapping condition, numerous studies show that workers with epilepsy tend to have average or better records with regard to safety on the job and attendance. Analysis of Workmen's Compensation files provide proof that epileptics have no greater claims experience than would be expected for nonhandicapped workers in similar occupational classes.[15] Proper placement is, of course, important. Persons whose seizures are not completely controlled medically should not work in a situation where there would be a risk of injury in the event of seizure. Also, for some persons with epilepsy, stress is a precipitating factor in the occurrence of seizures. Persons with this particular syndrome may require particular professional assistance in placement. The vast majority of epileptics, however, can be placed freely in the world of work without modifications to the work environment.

Despite their statistically excellent work record, the National Commission for the Control of Epilepsy has found that unemployment among epileptics is twice the national average and underemployment is even greater.[16] In the employment area, the person with epilepsy appears to be handicapped by consistent rejection caused by fear of what

is not understood. In a study conducted by Dr. Leonard M. Perlman for the National Epilepsy League, it was found that about half of the epileptics surveyed reported having difficulty in finding employment due to having a history of the condition.[17]

Epileptics are beginning to use Section 504 of the Rehabilitation Act as the basis for litigation in the employment area. In Drennon v. Philadelphia, the plaintiff alleges that she was denied employment at the Philadelphia General Hospital because of a policy of rejecting applicants with any history of seizures within two years of appointment.[18] In Duran v. City of Tampa, the case revolves on the validity of the City of Tampa Civil Service Board's medical standards which exclude any applicant for a fire fighter or policeman position who has had a history of epilepsy.[19] Interestingly, the federal government itself is involved in litigation concerning the employment of an epileptic. In Gibson v. U.S. Postal Service, the plaintiff is challenging the government's contention that epilepsy makes him medically unsuitable for employment as a Mail Handler.[20]

In response to increasing requests for legal assistance, the Epilepsy Foundation of America has established a Legal Advocacy Subcommittee as the center of a nationwide legal advocacy network. The subcommittee hopes to handle cases of a national thrust and establish precedents which will be of help to broad advocacy efforts.[21]

BLINDNESS

About two out of each 1,000 persons are blind; 10% of these persons are under 20 and 50% are over 65 years of age. Cataract and glaucoma are among the principle causes of this disability. Approximately 10% of

blindness is caused by injury, with occupational accidents figuring significantly in this category. There are varying degrees of visual impairment, including the need for corrective lenses, tunnel vision, and lack of visual acuity. The definition of blindness from a legal standpoint is when vision is not better than 20 over 200, or when the widest field of vision is less than 20 degrees.[22]

Even a cursory examination of the literature is indicative of continuing problems regarding the acceptance of the blind and visually impaired into the job market. To quote Wacker: "...The outstanding barrier [against employment of the blind] is the still phenomenally deficient information, and the socially preconditioned attitudes of the sighted world about blind people. The outside world continues to view blind men and women as a pathetically fragile, idle group, incapable of competitive employment...."[23] Myths and negative attitudes continue to abound concerning the population. "Blind persons have frequent accidents." "There are few things that a blind person can do." "Blind persons need much assistance." "The blind person will have trouble getting to work." "A blind person will have trouble getting around." We need not take time to discuss the lack of validity in these arguments, but we must take note of their prevalance in society and, particularly, among employers.

A recent survey done by the magazine Accent on Living concerning occupations of blind persons may be of interest. Accent found, "...Broadly speaking, there were two main categories [of occupations]. There are those who make their living by using their mental abilities: Attorneys, teachers, ministers, physicians, counselors, psychologists, economists,

and managers and directors of various agencies. Then there are those who perform various physical tasks not requiring sight: Typing, darkroom work, parts assembly and packing, piano tuning, and using the telephone."[24]

A great deal is being done technologically to change the job market for blind individuals. For example, the New Jersey Institute of Technology is working on adapting the laboratory equipment used in mechanics, electronics, physics, and chemistry for use by blind persons. The Institute has developed an adapter for the spectroscope instrument, a devise which analyzes the chemical composition of a product. The sighted chemist reads the spectroscope by a graduated series of lines from a burning source. The blind chemist can read the spectroscope through an audio detector and a braille scale.[25]

Since the Section 504 Regulation speaks to the question of auxiliary aids both in the employment and the educational arenas, the author believes it is appropriate to list some of the aids currently available to assist blind persons:

1. Optacon. The Optacon is a compact, portable reading aid which converts the image of a printed letter into a vibrating tactile form that a blind person can read with one finger. Optacon is an acronym for optical to tactile converter. The devise provides independent access to print without transcription into braille. However, it requires physical and mental skills, as well as a good deal of motivation, to learn to operate. It is manufactured by Telesensory Systems, Inc.

2. Stereotoner. The stereotoner is a minature camera with a built-in light and ten photocells arranged in a vertical column. The photocells activate as they are passed over the darkened part of a letter's image. As the photocell is activated, electronic circuits provide a musical tone, in a different pitch for each cell. Photocells near the bottom produce low pitch tones; upper cells produce high pitched tones. A person trained with this device can translate the musical tones into a mental visualization of the print.

3. Kurzweil Reading Machine. This device converts all types of printed materials into synthetic spoken English at a rate of approximately 150 words a minute. The devise has a small scanning camera which transmits visual images to a small computer. The computer recognizes each letter by its geometric characteristics and than uses a memory bank of phonetic rules to convert the letter combinations into sounds. (The bank contains some 1,000 rules and 2,000 exemptions.) Electronic circuits then produce synthetic speech which has been likened to that of a middle-aged man who speaks English with a Swedish accent. As of early 1978, there were 15 prototype machines. The cost of each machine is about $50,000 but with production should reduce to the $5,000 to $10,000 range.[26]

4. The Speech Plus Calculator. This device is a conventional portable calculator which announces every entry and result in a synthetic speech. It is manufactured by Telesensory Systems, Inc.

5. Varispeech. This device is a compressed speech machine, enabling one to play back a cassette at 1/2 to 2 1/2 times the original recording speed. This is done without the expected change in voice pitch which normally accompanies speed changes.

6. Closed circuit television systems. There are a number of such systems designed to help those with impaired vision to read printed material. They display print magnified four or more times.

7. SAGEM Braille Terminal. This terminal prints full page braille in response to input from a variety of sources such as card decks, paper tape readers, or computer outputs.

With the aid of devices such as those listed above, a wider variety of employment activities should be opened to blind persons. It is significant to note that the New Jersey legislature recently amended the New Jersey Law Against Discrimination to cover the subject of employment of blind persons. A new section states: "unless it can be clearly shown that a person's blindness would prevent such person from performing a particular job, it is an unlawful employment practice to deny to an

otherwise qualified blind person the opportunity to obtain or maintain employment, or to advance in position in his job, solely because this person is blind or because such blind person is accompanied by a guide dog."[27]

There are several interesting litigations concerning the rights of blind persons in the world of work. In Bevan v. New York State Teachers Retirement System, the judge ruled that blindness, in and of itself, does not impair the facilities required to be an effective teacher. He further ruled that the school system must supply the teacher with whatever special resources were necessary to carry out the ancillary functions of paper grading, calling on students who raise their hands, etc.[28] In Gurmankin v. Costanzo, a United States Court of Appeals affirmed that the Philadelphia School District was acting unconstitutionally in precluding blind persons from taking the teachers' examination. Ms. Gurmankin, a blind teacher who desired to teach sighted students, was awarded a teaching position and an adjusted date of seniority.[29]

DEAFNESS

There are approximately 13 million Americans who have some loss of hearing in one or both ears. There are approximately 250,000 deaf adults, or one out of every 500 adults, whose hearing can not be restored by medical treatment. Severe or profound deafness is a relatively low-incidence handicap, affecting approximately 7.5 out of every 10,000 Americans.[30]

A key problem among deaf persons is not unemployment, but underemployment.[31] A survey was conducted of some 4,000 deaf clients rehabilitated and placed in jobs. About one out of five deaf clients versus one out of 20 United States workers were placed in unskilled

jobs; one out of four versus one out of eight in service jobs. In professional, technical, and managerial occupations, only 8% of the deaf was represented, compared to 24% nationally.

To the author, there seemed to be two major factors contributing to such underemployment. The first is misconception. There is a totally deplorable tendency on the part of the average citizen to assume that lack of speech connotes feeble-mindedness.[32] Additionally, there is a common tendency to believe that deaf persons who want to communicate can learn to lipread. Unfortunately, lipreading is an extremely difficult art because there are actually few distinct movements of the lips in speech and many sounds appear on the lips as the same. Vernon estimates that most deaf people comprehend only 5% of communication through lipreading alone.[33] The best lipreaders get less than 50% of what is said and the best lipreaders are hearing persons who associate the sound of the word with the lip movement. Studies at the Tracy Clinic in California found that non-deaf college sophomores who never studied lipreading were better at it than deaf children to whom it had been taught for most of their school lives.

The second major factor in underemployment seems, to the author, to be low educational level. Only some 5% of deaf youths who leave school at age 16 or over have a tenth grade educational achievement level. Some 60% are at grade level 5.3 or below and 30% are functionally illiterate. Low reading scores are the most difficult aspect of the basic problem.[34]

To a greater degree than with other fields of special education, the area of education for the deaf has been plagued historically by

controversies which have tended to divide education professionals into polarized groups; oral versus total, day versus residential, mainstreaming versus special schools. To quote Dr. David M. Denton, the deaf "...become the heirs of the educational devastation resulting from professional prejudice...."[35]

Section 504 and Public Law 94-142 have served to further enkindle the flames of dispute concerning education of the deaf. At the risk of being accused of oversimplifying a very complex matter, the author believes there are two major schools of thought. One group believes predominately in training deaf persons to understand spoken language through the medium of lipreading and training of residual hearing. This group would aim toward maximizing "mainstreaming" with the provision of necessary support services such as resource rooms.

The second major group also believes in speech training, lipreading, and improvement of residual hearing. However, they feel these methods must be supplemented by simultaneous sign language presentations to provide a "Total Communication" environment. Many in this group fear that indiscriminate use of the mainstreaming concept will deprive deaf students of the "Total Communication" environment they need to learn. To quote Dr. McCay Vernon: "What does [mainstreaming] mean for a deaf student? He sits in classrooms with hearing children where he cannot hear or understand what the teacher says. If he is a good lipreader, he may get from 5% to 20% of what the teacher says when the teacher's lips can be seen. How can a deaf student learn history, mathematics, or English if he can only get this small percentage of his classroom lectures. When student discussion takes place, the situation is even more impossible. By the time the deaf youngster locates the student who is

speaking, someone else has started to talk, thus, the deaf individual misses out completely...Despite the gross inappropriateness of this approach of mainstreaming deaf children, it is easily the most widely used form now practiced in the United States...We have had [mainstreaming] for 30 years or more. It has failed the overwhelming majority of deaf children. Now, by describing these programs as mainstreaming, by inducing the federal government to legislate them, and by getting state legislators to mandate local education, we have caused the practice of mainstreaming to sweep the country. The issue is not whether the principle of mainstreaming is good or bad. The issue is that the way it is done and now exists in the overwhelming majority of school systems is grossly inappropriate to the needs of hearing-impaired students."[36]

Sufficient to say, there are many who disagree with Dr. Vernon. Others point to the fact that over 35% of deaf children spend all, or at least part, of their day in classrooms with their hearing peers.[37] Such integration is viewed as proof that the deaf, with proper training, can successfully function in the hearing world. "Total Communication," particularly as practiced in residential schools, is viewed as segregationalist, separating the hearing impaired from the "real world."[38]

Amidst such controversy, it is difficult for those in administrative positions to make decisions concerning the education of the deaf. The author makes the following suggestions. First, concerning testing, the science of audiology certainly provides input by quantifying degrees of hearing impairment. However, there does not seem to be an ironclad

correlation between degree of hearing loss and appropriateness of a particular educational methodology.[39] Also, there are testing procedures which are indicative of the capabilities of a child to learn through the aural versus visual avenues. Such tests, added to audiological data, personality, intelligence, and other measurements, can lead to a highly sophisticated recommendation for prescriptive education.[40] Second, the viewpoints of parents should receive great weight. Many strategies for the education of deaf children require considerable parental involvement and cooperation. Third, oral programs, which concentrate primarily on the training of residual hearing, lipreading, and speech therapy, are appropriate for some hearing-impaired children. Probable candidates are those with good IQs, outgoing personalities, supportive parents, and a good bit of trainable residual hearing.[41] Fourth, the greater the degree of hearing impairment, the greater will be the need for additional supportive services. Resource rooms, with specially trained personnel, will be a necessity for educational and social growth.[42] Fifth, most hearing-impaired students with difficulties classed as severe or profound will best be placed in a "Total Communication" environment. To quote Denton, "...The probability for academic success may be reasonably good for many children with mild to moderate impairment in mainstream educational program utilizing the oral-aural modes of communication, assuming essential support services are included. By contrast, almost all children with severe to profound impairments require a total communication system in order to be given a fair chance for academic and personal success."[43] Sixth, the "Total Communication" environment can be provided in a number of settings, dependent upon the degree of other

support services required. Holcomb advocates placing the deaf child in a classroom with hearing children and a tutor-interpreter who renders into signs what the regular classroom teacher says. The tutor-interpreter also helps the deaf and hearing children in the class by tutoring or teaming up with the regular teacher.[44] The author, however, believes this plan will have limited use because it does not provide for full socialization of the deaf student. Most students with severe or profound hearing losses will require services available only at regional and state centers.

THE MENTALLY HANDICAPPED

During the public comment phase proceeding the promulgation of the Section 504 Regulation, there were a sizable number of commentors who objected to the inclusion of mental illness within the definition of handicapped persons.[45] Rationale closely followed the objections raised for the inclusion of alcoholics and drug addicts. For example, educators feared that inclusion of the mentally ill would cause serious disruptions to their school programs. Similarly employers complained that they might be forced to hire persons with bizarre behavior which would prevent successful performance on the job. These arguments were not telling and the Department of Health, Education, and Welfare made no change with regard to the inclusion of the mentally handicapped in the final promulgation.

In the Notice of Intent promulgation, the public was asked to comment on 15 critical issues. One of these issues was whether the institutionalized handicapped had a right to receive or refuse treatment

and to be paid for work done. The issue of compensation for patient labor became moot when the Department of Labor issued a regulation at 42 FR 15224. Concerning other rights of the institutionalized handicapped, the Department took the position that it was beyond the authority of Section 504 to include provisions on adequate and appropriate psychiatric care or safe and humane living conditions. The courts have not necessarily agreed. In Halderman v. Pennhurst, Judge Raymond Broderick ruled that Section 504 prohibited "...unnecessarily separate and minimally inadequate services...."[46] In connection with his use of Section 504, Judge Broderick quoted the poignant words delivered by the late Senator Hubert Humphrey during the bill's introduction on January 20, 1972:

> I am calling for public attention to the three-fourths of the nation's institutionalized mentally retarded, who live in public and private residential facilities which are more than 50 years old, functionally inadequate, and designed simply to isolate these persons from society... These people have the right to live, to work to the best of their ability, to know the dignity to which every human being is entitled. But too often we keep children, whom we regard as "different" or a "disturbing influence," out of our schools and community activities altogether... Where is the cost effectiveness in consigning them to "terminal" care in an institution.

The mere emptying of institutions is not sufficient. To quote O'Connor: "The philosophy that anything is better than an institutional placement must be seriously questionned, at least on a short-term basis. With sufficient planning, appropriate program implementation, and careful monitoring, community placement can provide excellent opportunities for our handicapped citizens. Without these precautions, hundreds, even thousands, of individuals could wind up in mini-institutions without

public attention and resources now available in institutions."[47] The author believes that Section 504 will provide a great deal of the momentum necessary to assure that such planning and program implementation takes place.

DISCUSSION QUESTIONS

1. The Philadelphia Evening Bulletin recently quoted Lee and Blanche Cohen, parents of two sons now at Pennhurst. It characterized the Cohens as "outraged" at the decision to close the institution. The Cohens head the Pennhurst Parents Association and said, "We're not going to take this lying down." Do you believe Broderick's decision to close Pennhurst was correct?

2. A student with a moderate hearing loss has transferred into our district from Delaware. At her former school, she was "mainstreamed" with the assistance of a tutor-interpreter. Her former school utilized the so called "Holcomb Plan." Her parents have requested the same educational methodology be established here. The Board of Education objects since the system will cost several thousand dollars for a single deaf pupil. Must we utilize the method?

3. If you were a vocational rehabilitation counselor, would you advise an epileptic client to inform a prospective employer of his or her epilepsy before being hired?

4. One of our elementary school students has been proposed for review by our child study team because of disruptive behavior in the classroom. We desire to schedule an interview with the child's parents to explain the situation and assure that the child's rights are protected. However, the child's parents are both deaf. Must we hire an interpreter for the conference?

5. We operate a sheltered workshop for mentally retarded in the mild to moderate categories. Our clients work with a great deal of mechanical equipment. A prospective client has applied for admission who meets all our criteria but has epilepsy, not completely under control. We have denied him admission to our program since we fear the risk of injury in the event of a seizure. His parents are threatning to file a complaint under Section 504. Are we justified in our decision?

6. You are a vocational rehabilitation counselor. An employer calls you and explains that he has one very noisy section of his factory in which he has difficulty keeping workers. He informs you that deaf workers would be "ideal" for the job. He asks you to refer deaf clients to him. What would be your reaction?

7. My Board of Education understands that preschool training may be very valuable for deaf children. We have a number of such children in our community. Can we receive any federal or state assistance for the education of these children?

8. To what extent is the problem of attitudes central to all the issues confronting handicapped people in the areas of employment and education?

9. Should employers be required to hire those handicapped people with predictably short life expectancy if they are otherwise qualified for the job? What about company paid life insurance programs in such cases?

10. There seemed to be two views concerning the proper role of the sheltered workshop. Some feel they exist for the purpose of providing handicapped people with rehabilitation, training, and placement services. Others feel their purpose is to provide those handicapped people who cannot be placed in competitive employment situations with sheltered employment. Do you believe the sheltered employment role is consistent with the intent of Section 504?

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CHAPTER XI

SELF-EVALUATION PROCEDURES

Section 84.6(c), Subpart A, of the DHEW regulation implementing Section 504 of the Rehabilitation Act of 1973 requires each recipient to evaluate all of its policies and procedures and their effects upon handicapped persons, to determine whether discrimination is present, and to modify the policies and procedures as necessary to achieve equal access and opportunity. The process must be completed by June 2, 1978. The specific wording of the regulation is quoted below:

> (c) Self-Evaluation. (1) A recipient shall, within one year of the effective date of this part:
>
> (i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;
>
> (ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and
>
> (iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and procedures.
>
> (2) A recipient that employs 15 or more persons shall, for at least three years following completion of the evaluation required [above]...maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted, (ii) a description of the areas examined and any problems identified, and (iii) a description of any modifications made and any remedial steps taken.

The self-evaluation should be the culmination of efforts to comply with the Section 504 Regulation. The following efforts should have been accomplished prior to the self-evaluation process: (1) An employee should have been designated to coordinate Section 504 compliance efforts, (2) Grievance procedures incorporating due process standards should have been adopted to assure prompt and equitable resolution of complaints concerning Section 504; (3) By August 2, 1977, notice should have been given to employees and beneficiaries that the recipient does not discriminate in violation of Section 504 and such notice included in any recruiting or general information publications; (4) By August 2, 1977, program accessibility was to have been achieved for all activities except where structural modifications were required, and (5) By December 2, 1977, a transition plan was to have been completed identifying physical obstacles to accessibility and delineating a schedule for their removal as soon as possible but prior to June 3, 1980.

The self-evaluation procedure does not introduce any new programmatic elements. It, rather, calls for an extensive review of what should have already been done. The review, like the transition plan, is to be accomplished in consultation with handicapped persons and their organizations. The self-evaluation is to be maintained as a public document until June 2, 1981.

The self-evaluation does not require a de novo examination of all facilities and procedures. It certainly does not require a resurveying of buildings. To assure objectivity, however, the author would recommend as little reliance on previous work as possible. As a practical matter, the author would recommend that the self-evaluation consist of a review of all policies and procedures concerning employees

and beneficiaries and a review of the architectural surveys and transition plan. The author recommends the self-evaluation result in a complete document outlining the recipient's efforts to comply with the Section 504 Regulation. In addition to the regulatory requirements previously enumerated, the author feels the self-evaluation document should include, as attachments, the following: (1) The document appointing an employee to coordinate Section 504 compliance, (2) A copy of the grievance procedure for complaints alleging Section 504 noncompliance, (3) Copies of notices used to inform employees and beneficiaries of intention to comply with Section 504, (4) Materials generated in conjunction with assuring program accessibility by administrative means prior to August 2, 1977, and (5) The Transition Plan. (The author recommends that requirements in (4) and (5) be incorporated into one document to better display the interface between administrative and architectural solutions to program accessibility.) Upon completion, the self-evaluation thus becomes a Master Plan for compliance with the Section 504 Regulation.

ORGANIZING FOR SELF-EVALUATION

The first step is to appoint an official as responsible for the self-evaluation process. In the author's opinion, the official designated as responsible for overall compliance should be responsible for self-evaluation. The author also believes this same official should have been responsible for the development of the Transition Plan. Next, it is necessary to organize a self-evaluation team. The team must contain handicapped persons as a matter of regulatory compliance

and, as a practical matter, to assure feasibility of methods and prevent overreaction. The literature abounds with examples of recipient's planning for modifications which go far beyond the needs or desires of the handicapped persons to be served. Recipients must guard against paternalism and overprotection, the so called "medical model." It is important that handicapped individuals chosen for the self-evaluation process represent a broad cross section of disability needs. Those with sight and hearing impairments, as well as those with mobility impairments, should be represented. Where appropriate, those with mental handicaps, or their advocates, should also be included.

The composition of the remainder of the team will vary from institution to institution dependent upon the type of services provided. However, in general, the team should be selected to include all necessary expertise and, to assure maximum involvement, should have representation from every facet of the organization. While titles will vary from recipient to recipient, certain functions can be identified, prima facie, as essential. Among them are:

1. Plant Engineering: To provide details about the facilities and current plant operating schedules.

2. Business Office: To assure that necessary budget commitments are made.

3. Development Office: For identification and development of potential sources of funding.

4. Security Office: For implementation of parking changes and to identify potential problems in mobility between buildings.

5. Registrar/Admissions/Input: To provide data on anticipated disabled populations to be served.

6. Public Relations: To promote a positive image of the institution and of the disabled as part of the total project.

7. Operational Department Heads: To provide insight into the functioning of the organization and to assure across-the-board commitment.

To formalize the self-evaluation process, some form of guide is necessary. To the author's knowledge, only one such guide is currently in print. It is Guide to the Section 504 Self-Evaluation for Colleges and Universities, published by the National Association of Colleges and University Business Officers, Washington D.C. The Guide has been reviewed and approved by the Office for Civil Rights of the Department of Health, Education, Welfare. Copies are available from the Office for Civil Rights at 330 Independence Avenue, S.W., Washington, D.C. 20201. Copies of the Guide on tape cassettes for the blind are available from NACUBO at 1 Dupont Circle, Suite 510, Washington, D.C. 20036.

For recipients other than colleges and universities, it is necessary, at least at present, to develop guides independently. The procedure is not particularly difficult. It involves an analysis of the Section 504 Regulation and the production of a list of questions, applicable to the recipient's particular operation, concerning compliance. Attachment 1 to this chapter is such a guide prepared for the mythical Metropolis Workshop, about which a Model Transition Plan was developed in a previous chapter.

After a guide has been developed, the self-evaluation team should meet. They should be supplied with copies of all relevant documents such

as the Section 504 grievance procedures, materials concerning administrative changes for program accessibility, the transition plan, documents used in the notification process, employment applications, beneficiary or client applications, union agreements, service subcontracts, employee insurance contracts, and the Section 504 Regulation. The author believes it is probable the self-evaluation team will make changes to previous determinations concerning program accessibility, both administrative and architectural. Revisions to the transition plan may, therefore, be in order. After the self-evaluation is completed, the self-evaluation document, with corrected appendices, should be the Master Plan for the institution's compliance with the Section 504 Regulation.

IMPLEMENTATION

As has been pointed out in previous chapters, the author considers it unlikely that there will be any major infusion of federal funds to support implementation of Section 504. This underscores the requirement to assure that modifications are practical, cost effective, and do not involve overreaction. There are some sources of private funds. The author would recommend reference to two texts: (1) User's Guide to Funding Resources, available from the Chilton Book Company, Radnor, Pennsylvania 19089 and (2) Handicapped Funding Directory, available from Research Grant Studies, Post Office Box 357, Oceanside, New York 11572. Some federal funds may be available under such authorities as the Higher Education Facilities Act, the HUD College Housing Program, the Comprehensive Employment Training Act (CETA), the Urban Renewal Act, the

Education for All Handicapped Children Act, and annual Public Works Acts. Current status of funding under authorities relevant to education have been covered in Chapters VII and VII.

The author recommends the final self-evaluation product be very specific in nature. It should list the work which must be done, assign specific responsibilities for accomplishment, and set up target dates for completion. It should also include a system for management surveillance. The author recommends some form of milestone event oversight be initiated. The Program Evaluation Review Technique (PERT) or Ghant Charts are possibilities. Top management, or if appropriate the institution's board, should receive periodic briefings on progress.

There are two attachments to this chapter. The first is a self-evaluation guide prepared for a recipient whose programs are parallel to those of the mythical Metropolis Workshop previously used in this study. The author wishes to stress that the guide does not involve Subpart F alone, but incorporates questions derived from Subparts A, B, and C also. Recipients must assure that the self-evaluation includes the entire Section 504 Regulation, not merely the subpart specific to their type of institution. The second attachment to this chapter is the resultant self-evaluation from the Metropolis Workshop. In the interest of economy, the attachments to the self-evaluation, such as the grievance procedures and the Transition Plan, are not included. These documents, however, are available as attachments to other Chapters of this work.

SELF-EVALUATION GUIDE FOR METROPOLIS WORKSHOP

1. Has an Assurance of Compliance, HEW Form 641, been completed and forwarded to HEW?

2. Has an employee been designated to coordinate the Workshop's efforts to comply with Section 504?

3. Has the Workshop notified its employees and clients that it does not discriminate on the basis of handicap in violation of Section 504 and its implementing regulation?

4. Has the Workshop's professional association been notified? Do the notifications include the name of the employee designated to coordinate Section 504 compliance activities?

5. Has the Workshop made continuing efforts to assure that employees and beneficiaries are aware of our policy of nondiscrimination? Are appropriate notices posted on bulletin boards? Do our materials for new employees and clients contain appropriate statements? Is our nondiscrimination policy contained in informational brochures?

6. In fulfilling the requirement for giving notice concerning our policy of nondiscrimination, has the Workshop taken initial and continuing steps to include those with impaired vision or hearing?

7. Has the Workshop adopted grievance procedures, incorporating appropriate due process standards, which provide for prompt and equitable resolution of complaints alleging any action prohibited by the Section 504 Regulation?

8. Does the Workshop have procedures to assure that all its employees and clients are aware of its Section 504 grievance process? Do these procedures adequately cover those with vision or hearing impairments?

9. When we recruit for employees, do our procedures exclude any class of handicapped persons because of the nature of the media involved?

10. Are all of our employment intake procedures accomplished at locations which are accessible? Do we provide potential employees with any help necessary in filling out employment applications? Do we have readers for the blind, interpreters for the deaf, and persons to assist in writing available during this process?

11. Have we reviewed the physical and mental requirements of each of our jobs to assure that no criteria are included which would discriminate against handicapped persons, unless such criteria are specifically necessary for job accomplishment? (A voluntary Affirmative Action item of the Workshop.)

12. Have we reviewed all tests used for employment decisions? Do these tests measure what they purport to measure and not such factors as impaired sensory, manual, or speaking skills? Do we have alternate testing procedures for those with sensory, manual, or speaking handicaps? Have we done all we can to assure that our employment testing program is nondiscriminatory? Are all our job requirements really relevant?

13. Is our Application for Employment Form in compliance with the Section 504 Regulation and the New Jersey Law Against Discrimination? Since the Workshop has a voluntary Affirmative Action Plan, we do ask questions concerning handicapping conditions. Is the form clear that answering such questions is purely voluntary?

14. Are Workshop procedures adequate to assure that medical information obtained through applications for employment or employment interview is kept confidential? Such information may only be released to supervisors for planning of necessary accommodations, medical personnel for the provision of emergency treatment, and Government officials investigating compliance with Section 504.

15. Our Workshop preconditions employment upon the satisfactory completion of a medical examination. Are we certain that the physical requirements set up for each of our positions are indicative of skills actually required for job performance?

16. Are the results of medical examinations kept confidential? Do we have a procedure for controlling access to these forms? Medical information should only be released to supervisors as necessary for accommodation, medical personnel as necessary for emergency treatment, and Government officials investigating compliance with Section 504?

17. Are there any policies, procedures, or practices of the Workshop related to employment which have a discriminatory effect? Have we reviewed policies relevant to hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, the right of return after layoff, etc.?

18. Is the agreement with the Metropolis Workshop Professional Association free of discriminatory provisions?

19. Have medical, hospital, accident, life insurance, and retirement fringe benefits been reviewed to assure nondiscrimination on the basis of handicap?

20. Are the Workshop's social and recreational activities made available to all employees? Are handicapped employees denied participation due to lack of accessibility or auxiliary aids?

21. Are our programs of leave, such as vacation, sick leave, leave of absence, and sabbaticals administered on a nondiscriminatory basis?

22. Are the Workshop's programs of apprenticeship, internship, and staff development administered on a nondiscriminatory basis?

23. Are there adequate parking facilities for handicapped employees and handicapped applicants for employment?

24. Do we have a policy concerning "reasonable accommodation?" Have we determined at what level the decision concerning "reasonable accommodation versus undue hardship" rests?

25. Have we adequate administrative procedures to insure documentation of decisions regarding refusal to hire or promote because of undue hardship?

26. In advertising our services, do we assure that no class of the handicapped are excluded because of the nature of the media used?

27. Are the Workshop's intake procedures accessible for handicapped clients? Are the facilities program accessible? Do we provide necessary services such as readers for the blind, interpreters for the deaf, and writers?

28. Do we have alternate, valid testing procedures for clients with impaired sensory, manual, or speaking skills?

29. What are our policies concerning drug addicts and alcoholics as clients? Are we certain that only the manifestations of these conditions, and not the conditions themselves, are taken into consideration when determining eligibility for services?

30. In our Sheltered Workshop, Work Activity Center, and Office Skills Training Program, have we made reasonable accommodation for the needs of disabled clients? To the degree practical, can the orthopedically handicapped, the blind, and the deaf operate all the machinery? Are there interpreters for the deaf available? Are written materials available in other forms for the blind?

31. At the Dormitory Unit, do we assure that social and recreational activities are open to all clients, regardless of the nature of their handicaps?

32. Are the Workshop's transportation facilities open to all classes of handicapped persons?

33. In our program of placing clients outside the Workshop for trial employment periods, have we assured that opportunities for trial employment are "on the whole" available to all classes of handicapped clients?

34. In our program for providing housing opportunities for those being discharged from the Dormitory Unit, do we assure that such opportunities are available "on the whole" to all classes of handicapped clients?

35. Since Dormitory Unit Supervisors live on the premises, are there equal opportunities in housing for disabled supervisors?

36. Do our counseling operations introduce any stereotyped images of capabilities with regard to particular handicapping conditions?

37. Have all contracts of the Workshop been analyzed to assure that the Workshop is not, as a result of such contracts, subjecting handicapped persons to discrimination on the basis of their handicaps?

38. Has the Workshop made all of its programs accessible to handicapped persons to the degree that can be accomplished through administrative means?

39. Has the Workshop prepared a transition plan which includes a schedule for removal of all architectural barriers to program accessibility as soon as possible but prior to June 2, 1980?

40. Has an employee been designated as the person responsible for implementation of the transition plan?

41. Is the transition plan a public record available for inspection during regular business hours?

42. Have we assured that management officials and officials of the Physical Plant Department are aware of the requirements of New Jersey Administrative Code concerning criteria for barrier-free design in new construction and building modification?

43. Have we assured that no qualified handicapped person is denied the opportunity to participate as a member of any of our planning, advisory, or governing boards?

44. Are administrative procedures in being to include assurances of nondiscrimination on the basis of handicap in any applications for grants from the Department of Health, Education, and Welfare?

METROPOLIS WORKSHOP

METROPOLIS, NEW JERSEY

June 1, 1978

SELF-EVALUATION

1. Statement of Policy. It is the policy of the Metropolis Workshop not to discriminate on the basis of handicap. The Board of Trustees and the management of the Workshop realize that it is necessary for our programs, when viewed in their entirety, to be accessible to handicapped persons. The Board has, therefore, directed that such steps as necessary be taken to remove any obstacles to full participation by handicapped persons through either administrative or architectural means. In all cases, our intention is to promote full participation by handicapped persons, allowing them to function with maximum independence.

2. Action to Date. By an action of the Board of Trustees on June 1, 1977, Mr. George A. Perry, Deputy Executive Director, was appointed as overall Workshop Coordinator for the implementation of the Section 504 Regulation. A copy of his letter of appointment is included as Attachment 1. On June 10, 1977, the Workshop published its grievance procedures to handle allegations of discrimination based on handicap. A copy of these procedures is included as Attachment 2. On July 2, 1977, Mr. George A. Perry was also appointed as the responsible official for development and implementation of the Workshop Transition Plan. A copy of Mr. Perry's letter of appointment is included as Attachment 3. Although not required by the Section 504 Regulation, the Transition Plan includes not only the scheduling of necessary architectural modifications for program accessibility, but also administrative changes as well. All

administrative changes were programmed for accomplishment prior to August 2, 1977; all architectural modifications were programmed for completion as soon as possible, but not later than June 2, 1980. A copy of the Workshop Transition Plan is included as Attachment 4. In addition to the statement of policy contained in the grievance procedures of June 10, 1977, a separate policy statement concerning nondiscrimination was issued on the same day. This statement is included as Attachment 5. This statement is posted on the bulletin boards of all our facilities on a permanent basis. It includes not only our policy of nondiscrimination, but also identification of Mr. Perry as the official to whom any allegations of discrimination on the basis of handicap are to be directed. A shortened version of this policy has now also been included in all our general informational brochures.

3. The Self-Evaluation Team. By an action of the Board of Trustees on January 3, 1977, Mr. George A. Perry was appointed as the responsible official for conducting the self-evaluation required by the Department of Health, Education, and Welfare Regulation implementing Section 504 of the Rehabilitation Act of 1973. A copy of Mr. Perry's appointment is included as Attachment 6. The board further charged Mr. Perry with forming a self-evaluation team to include representatives from all phases of the Workshop's operation and, also, to include persons with a wide range of disabilities. The following team was formed:

Mr. George A. Perry, Team Chief

Mr. William T. Corbett, Physical Plant Director

Ms. Susan A. George, Sheltered Workshop Operations (Mobility-Limited)

Mr. Peter K. Jennings, Work Activity Center Operations

Ms. Janice A. Kelly, Dormitory Supervisor (Hearing-Impaired)

Mr. Peter J. Staples, Personnel Manager

Mr. John D. McNulty, Office Manager

Mr. Barry A. Steinborn, Director of Development

Ms. Monica C. Corbett, Comptroller

Mr. Bunker T. Archibald, Sheltered Workshop Foreman (Mobility-Limited)

Ms. Bettye T. Fisher, Counselor (Visually Impaired)

Dr. Lillian M. Hellforth, Psychologist (Parent of mentally retarded client)

Ms. Cindy J. Foreman, Client (Blind)

Mr. Clark S. Kent, Executive Director, Ex Officio

4. Self-Evaluation Techniques. Since no self-evaluation survey guide was available for a facility of our type, a subcommittee was formed to develop such a guide. The subcommittee was headed by Mr. Peter J. Staples and also included Ms. Susan A. George, Ms. Janice A. Kelly, and Dr. Lillian M. Hellforth. The guide developed by the subcommittee is included as Attachment 6. The entire committee met monthly between January and May 1978. All aspects of the Workshop's policies and procedures were reviewed against the guide. This included all the Workshop's relationships with employees, clients, and outside agencies.

5. Results of the Survey. The following is a listing of discrepancies found during the survey and corrective action to be taken on each:

a. An appropriate notice, signed by the Executive Director, was prepared, posted on bulletin boards, and sent to the Metropolis Workshop Professional Association. Nondiscrimination proclamations were also included in the Workshop's publications and in the taped versions of these publications for the blind. However, it was determined that no special effort had been made to assure that current blind employees and clients had been informed concerning the notice. Therefore, the directors of each of the divisions of the Workshop have been instructed to specifically brief all current blind employees and clients on the nondiscrimination policy. The briefing will also include the

grievance procedures for allegations of discrimination on the basis of handicap and the fact that Mr. George A. Perry is the individual who coordinates our Section 504 effort.

b. It was noted that our advertising for employees is done exclusively through the Metropolis Daily Planet and the publications of several New Jersey professional organizations. All advertisement is in the print media. This was considered potentially discriminatory to blind persons. To correct this potential discrimination and also to enhance our voluntary Affirmative Action Program, the Personnel Department will accomplish the following: (1) All vacancies will be listed with the local office of the Division of Vocational Rehabilitation Services, the Commission for the Blind and Visually Impaired, and the Counseling Department at the Veteran's Administration Action Office in Columbus (2) Announcements will also be sent to WSME Radio for inclusion on their "Services for the Blind" program, and (3) Announcements will be sent to the Office of Disabled Student Services at Sussex Community College and the Director of Special Services, Sussex County Vocational and Technical High School.

c. It was noted that applicants for positions as Dormitory Unit Supervisors, Work Activity Center aides, and Sheltered Workshop foremen were administered a psychological test, devised locally, successful completion of which had been considered a prerequisite to employment. The purpose of the test was to evaluate attitudes toward handicapped persons. There is no braille version of the test; therefore, it had been administered to blind applicants verbally. Blind applicants have consistently scored lower on the examination, due to difficulties in remembering the rather long questions and the multiple choice answers. The Personnel Department has been directed to cease administration of this test, based both upon Section 504 and upon possible conflict with the New Jersey Law Against Discrimination. We have no definite proof of the validity of this examination in predicting success in working with handicapped persons. Additionally, its format may discriminate against less educated persons and the fact that we do not have a Spanish language version may discriminate against Hispanics.

d. It was noted that results of preemployment medical examinations were filed with other personnel records in the Personnel Department. All members of the Personnel Department had access to these files and there was no specific control on the dissemination of medical information. The Director of Personnel was instructed to remove these records from the regular files and set up a special confidential file. Access to this file would be strictly limited as required by the Section 504 Regulation. The Director of Personnel was instructed to publish an implementing office procedure concerning medical records.

e. The offices of our dental service provider, the Metropolis Dental Service Plan, are not accessible to mobility-limtied patients. The Office Manager has been directed to inform the provider that we must sever our relationship if facilities cannot be made accessible.

f. The annual Workshop boat trip on the Passaic River Steamer Line was discussed. The boat company has consistently refused to accept mobility-limited persons for what it terms "safety reasons." It was determined to discontinue this annual event and substitute a recreational activity in which all our employees can participate.

g. Each professional employee of the Workshop has a Development Plan which includes outside training for professional advancement. Typical of items included in these Development Plans is attendance at seminars held by various professional organizations. It was found that certain of these seminars are held in inaccessible locations or do not provide necessary auxiliary services such as interpreters for the deaf. It was decided to discontinue the sponsorship of training in which all of our professional employees cannot reasonably participate. The Director of Personnel was instructed to prepare necessary office instructions concerning checking program accessibility for training opportunities.

h. While the Workshop has a policy to accomplish reasonable accommodations to the known needs of disabled employees or applicants for employment, there were no definitive guidelines concerning this policy. The Director of Personnel was instructed to prepare an instruction on this subject. The instruction is to include: (1) The authority to spend up to $1,000 per case on modification of equipment or facilities for accommodating a current or new employee upon the approval of the Director of Personnel and the director of the appropriate operational division; (2) the establishment of a Reasonable Accommodations Review Committee, consisting of the Deputy Executive Director, the Director of Personnel, and the Chief of the Physical Plant Department, to decide cases which cannot be handled within the $1,000 limitation; and (3) establish documentation of rationale whenever it is determined not to provide a reasonable accommodation on the basis of undue hardship.

i. The transition plan called for conversion of one accessible room in the Dormitory Unit for use as a client sleeping room. The room is now occupied by a mobility-limited client. One of the other, non-accessible sleeping rooms is used by the Dormitory Unit Supervisor on duty at nights. One of these supervisors uses a wheelchair for mobility and, therefore, does not have use of a sleeping room during night duty. The Chief of the Physical Plant Department and the Director of the Dormitory Unit were instructed to make additions to the transition plan to modify additional sleeping rooms. One will be modified in

1978 for use by supervisory personnel; one additional room will be modified each year for the next three years for client use. Cost per room is estimated at $500.00 to include the replacement of the current in-swinging bathroom door with a pocket door, tilting of bathroom mirrors, installation of grab bars near water closets and in tubs, and lowering of thermostatic controls.

j. Our current policy of requiring clients who have been identified as drug addicts or alcoholics to enroll in treatment programs was examined. It was determined that the policy should be rewritten to require such participation only if manifestations of these conditions interfere with participation in programs. The directors of the various operational divisions were instructed to modify their input procedures to include this guidance.

k. The two parking spaces reserved for the disabled at the Abbott-Woodson Complex have been found to be insufficient. The spaces are routinely used by mobility-limited employees leaving no spaces for mobility-limited applicants for employment or visitors. The Chief of the Physical Plant Department has been directed to modify the transition plan and convert three additional regular parking spaces into two additional parking spaces for the disabled.

L. It was determined that the policy of using a Dormitory Unit Supervisor to assist handicapped clients in the pool was inappropriate. In many cases, this has been found to be a physical impossibility. Therefore, the Workshop has decided to purchase a Hoyer Lift for use in the swimming pool area. The Director of the Dormitory Unit has been instructed to arrange for training of all Dormitory Unit Supervisors on use of the device.

NOTE: The target date for completion of all action items above is June 2, 1978, unless otherwise specified.

6. Oversight. Management surveillance of action items from this self-evaluation and from the Workshop Transition Plan are essential to success. Therefore, the Comptroller will prepare a series of PERT or Ghant charts outlining milestones. The Comptroller will report to the Deputy Executive Director on the status of accomplishment of these milestones within five days of the occurrence of each. The Executive Director or the Deputy Executive Director will report on progress to the Board of Trustees on a quarterly basis, at the January, April, July, and

October meetings. Reports will include an assessment by the Director of Development on the possibilities of outside funding.

7. This self-evaluation and all attachments are considered public documents. They will be kept available for public review in the Workshop's business office during normal business hours. They will be maintained on file at least until June 1981.

Clark S. Kent
Executive Director

DISCUSSION QUESTIONS

1. Do you believe that health, education, and social service providers in the State of New Jersey will be able to recruit sufficient handicapped persons to serve as advisors during their self-evaluation processes. Do you believe there should be some form of training on Section 504 for handicapped persons to act as potential advisors?

2. Do you believe the Department of Health, Education and Welfare is justified in requiring the completion of the self-evaluation phase before approved guides have been made available?

3. My school district provides health insurance coverage for its employees. The coverage, however, excludes pre-existing conditions for a period of two years. Do you feel that our participation in this insurance arrangement constitutes a discriminatory practice?

4. During a routine preemployment medical examination, our physician found that an applicant for a laborer's position had a degenerating disc condition in his back. In the physician's opinion, the work could aggravate the problem. May we refuse employment to this applicant on the basis of his back condition?

5. My agency consists of 15 separate community-based deinstitutionalization programs located throughout the state. A centralized self-evaluation of these programs seems impractical. May we accomplish self-evaluation on a local basis? How do we handle the fact that our local units are not autonomous with respect to funding?

6. The model self-evaluation calls for abandonment of a psychological test, primarily because versions of it are not available for those with various impaired sensory functions. Was this action appropriate?

7. Our self-evaluation calls for us to provide equal recreational opportunities for all of the clients in our deinstitutionalization program. However, we found this difficult on a practical basis due to attitudes prevalent in our community. For example, several local motion picture theaters refuse our mobility-limited clients entrance on the basis that their wheelchairs present a "fire hazard." If we only participate in activities which are nondiscriminatory, the practical result will be to limit opportunities for the majority of our clients. What action should we take?

8. Our workshop has a program of placing clients in the community for on-the-job training. Some of these employers will not accept clients with certain disabilities. May we continue to place clients with such employers?

9. We run a small day care center in downtown Metropolis, employing about 25 people. We are funded largely through federal grants. In our Transition Plan, we have programmed necessary building modifications so that persons using wheelchairs can enter our facility. What about deaf people? Must we train someone on our staff in sign language now? Is it acceptable that we state our intention to hire an interpreter for the deaf should one be necessary?

10. I understand that the Transition Plan must include architectural changes necessary to assure that my programs are accessible to handicapped persons. I understand this with respect to clients, but what is its effect with regard to employees? Are facilities used by employees only to be included in the Transition Plan?

CHAPTER XII

ENFORCEMENT

Section 504 of the Rehabilitation Act of 1973 is a nondiscrimination statute. It prohibits discrimination against handicapped persons in any federally funded program or activity. To date, only the Department of Health, Education, and Welfare has issued an implementing regulation for Section 504. That regulation is 45 CFR 84. Under Executive Order 11914, other agencies granting federal funds are also to promulgate implementing regulations for Section 504.[1] The Department of Health, Education and Welfare was designated as "lead agency" for that effort. DHEW has prepared implementing guidance for other agencies.[2] At this writing, we are in the commentary period for 30 such regulations from the other federal departments and agencies which grant assistance.

The scope of Section 504, as defined in the DHEW implementing regulation, is all recipients of federal financial assistance. The term "federal financial assistance" includes government grants, loans, contracts, or any other assistance in the form of funds, services of federal personnel, or real or personal property. Contracts, however, covered under this definition are limited. First, contracts of procurement, those under which the United States purchases supplies or services such as construction or research, are excluded. Such procurement contracts are covered, however, under Section 503 of the Rehabilitation Act, administered by the Department of Labor. Second, contracts of insurance or guarantee, Medicare Part B for example, are also excluded. This exclusion is based upon an analysis of the legislative

history of Section 504. It is apparent that Congress intended the scope of Section 504 to be the same as that of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[3] Titles VI and IX contain statuatory exemptions for contracts of insurance or guarantee.

Section 504 does have scope beyond the recipient who initially receives the federal assistance. The term "recipient" is defined as one who receives federal financial assistance either directly or through another recipient. Under this definition, agencies may be required to adhere to the Section 504 Regulation even though they do not receive assistance directly from the federal government. Those agencies who receive assistance from intermediary organizations which deal directly with the federal government are also covered. An example of this principle would be a local education agency which receives DHEW funding through the state education agency.

The scope of Section 504 also extends beyond those who are direct or indirect recipients of federal financial aid. Assume one of these direct or indirect recipients decides to accomplish a portion of its assisted program by contract. That contractural arrangement must be such that handicapped persons are not denied equal benefits or services, but rather are provided such services in the least restrictive way. As an example, take a senior citizens' program which contracts for lunches at a local food service establishment. It would not be permissable to exclude certain senior citizens, the mobility-limited for example, and serve them in a segregated location. Thus, Section 504 has at least limited effects

on the subcontractors of recipients, at least with regard to nondiscrimination in the provision of subcontracted services which are integral parts of aided programs.

The scope of Section 504 extends beyond primary and secondary recipients in a second way. Recipients are prohibited from providing "significant assistance" to any agency or organization which discriminates on the basis of handicap. The term "significant assistance" is not clearly defined. The legal history of the term suggests limiting to "...assistance without which an organization could no longer exist...."[4] Even this limited definition of the term, however, would include such organizations as fraternities, sororities, employee recreational organizations, school interest clubs, and some service subcontractors. Recipients may not aid such organizations if their policies are discriminatory. In the author's opinion, the test for discrimination is not whether there is a nondiscriminatory membership, admission or service practice, but rather whether programs, activities, and facilities are accessible to and useable by handicapped persons.

SUBPART G

In Subpart G, DHEW has adopted the complaint and enforcement procedures associated with Title VI of the Civil Rights Act of 1964 for enforcement of Section 504. These procedures are found in 45 CFR 80.6-80.10 and 45 CFR 81. The procedures are reprinted as Appendix B of the DHEW Section 504 Regulation at 42 FR 22695.

The enforcement procedures are relatively simple and will be presented here in broad outline form only. They begin by stressing the Department's role in providing assistance and guidance to recipients

on voluntary compliance. To assist the Department in this role, recipients may be required from time to time to provide various compliance reports and permit the Department access to their books, records, or other sources of information.

The Subpart recognizes two major forms of enforcement initiation; the compliance review and the complaint. The compliance review is Department initiated to inspect practices of recipients and determine whether they are in accordance with Section 504. The complaint procedure begins when any individual believes that he or she has been subjected to discrimination and files a written report with the Department. A complaint report must normally be filed not later than 180 days from the date of the alleged discrimination.

Whenever the allegation of discrimination is initiated, the Department investigates. If no problem is found, the recipient and the complainant are informed in writing. If there is a problem, the recipient will be informed and attempts made to resolve the matter by informal means, whenever possible. If informal means fail, a more elaborate form of enforcement may ensue.

DHEW has the authority to suspend or terminate federal financial assistance in cases of noncompliance with Section 504 of the Rehabilitation Act and its implementing regulation. The recipient, however, must first be given the opportunity for a hearing. Hearings are held before a hearing examiner in accordance with procedures in 5 U.S.C. 3105, the Administrative Procedures Act. After a decision has been finalized, it is sent to the recipient and to the committees of the House and the Senate having legislative jurisdiction over the program involved. The

order resulting from the decision takes effect 30 days later. The order will contain the terms and conditions necessary for a recipient to restore eligibility.

DHEW'S CAPABILITY TO ENFORCE

Responsibility for enforcement of DHEW's regulation implementing Section 504 rests with the Department's Office for Civil Rights (OCR). Many organizations of handicapped are concerned about the ability of OCR to enforce the Section 504 Regulation.[5] Such misgivings are based upon the "track record" of OCR in other areas of civil rights. In Adams v. Califano, WEAL v. Califano, and Brown v. Califano, plaintiffs have sought action because of alleged failures on the part of OCR to enforce civil rights legislation. In an affidavit to consolidate the three cases, OCR Director David Tatel admitted that, "...in the past OCR has failed to enforce the civil rights laws in accordance with congressional mandates and that lawsuits were necessary to mobilize this Department's enforcement energies...."[6] Tatel admitted before a committee of the House of Representatives in September, 1977 that, "unfortunately, OCR lacks the necessary resources to process all the Section 504 complaints...."[7] OCR's Proposed Annual Operating Plan, dated August 1, 1977, acknowledges a backlog of approximately 3,025 civil rights complaints as of July 1, 1977. During 1978, it proposes to investigate 42% of its backlog, but only 10% of its new complaints. Additionally, the office hopes to conduct approximately 200 compliance reviews during the fiscal year.

Specifically with respect to Section 504, there were approximately 400 complaints pending resolution in OCR at the end of the last fiscal

year. OCR estimates it will receive 570 new complaints during fiscal year 1978. Since the office anticipates only being able to process 180 complaints during Fiscal Year 1978, it is evident that there will be about 790 complaints in backlog when Fiscal Year 1979 begins. This situation is very disturbing to groups of the disabled. To quote Mr. James Gashel of the National Federation of the Blind, "...What we have is a constantly escalating backlog with only some vague promises of more efficiency and more staff...The growing backlog of 504 complaints can not be tolerated...[some] are already so old that justice has been denied the complainants...."[8]

Mr. Tatel has blamed past problems on a hiring freeze with concomitant shortages of enforcement personnel plus court directed orders to handle all discrimination cases involving race or sex in the 17 Southern and Border states on a specific time schedule.[9] The staffing problem should be eased, however, by a recent consent decree, the so called "Pratt Accord," which should result in the doubling of OCR's 800 person enforcement staff.[10]

COMPLIANCE REVIEWS

In addition to complaints, compliance reviews are a key method for enforcement of federal regulations. Compliance reviews are Department initiated and involve a comprehensive, on-site review of policies and procedures. The Department of Labor recently decided to expand its compliance review program with respect to Section 503 of the Rehabilitation Act of 1973. To quote Weldon Rougaeu, Director of the Office of Federal Contract Compliance Programs, "One of the reasons for directed compliance reviews is that we can go into a company and look at

an entire range of problems that affects the opportunities of handicapped people. We can deal with the employer on all these problems, and not just with a scattered few of the problems. Directed compliance reviews should result in more efficient and effective enforcement."[11]

Mr. David Tatel of OCR, in testimony before the House of Representatives, also attested to the value of compliance reviews. He stated that, "...complaints, although useful are not as successful in redressing wide spread and systemic problems in institutions...Compliance reviews, however, are the more effective technique for enforcing the law...the conduct of [compliance reviews], we feel, will demonstrate to recipients OCR's commitment to enforce this law fully...."[12] Tatel also stated that data collected from the Elementary and Secondary School Civil Rights Survey to be conducted in the Fall of 1978 will be used to identify targets for compliance review.[13] Parallel surveys will be conducted for health providers during Fiscal Years 1979 and 1980.

PRIVATE RIGHT OF ACTION

> ...when the rules, regulations, and actions of [federal] agencies fall short of the expectancies generated by legislative platitudes, those whose interests are most directly affected come to the courts to create the law necessary for the fulfillment of the perceived entitlements. (Atlantis Community, Inc. v. Adams, Federal District Court for Colorado, 1977).

In the commentary accompanying the promulgation of the Section 504 Regulation, DHEW notes comments received urging that the regulation incorporate a private right of action.[14] The Department took the stance that to confer such a right was beyond the authority of the

executive branch of government. They did note, however, that there is case law holding that such a right exists. They cited several cases including Lloyd v. Regional Transportation Authority and Gurmankin v. Castanzo.[15] The decision in Lloyd was affirmed by the 7th Circuit; Gurmankin was upheld by the 3rd Circuit.

While apparently there is a private right to action, it remains to be seen whether the courts will require an exhaustion of administrative remedies before accepting litigation on Section 504. This exhaustion doctrine, as developed in MCI Communication Corporation v. American Telephone & Telegraph Co., requires a court to refer a matter to an administrative agency for resolution to avoid conflicts between the courts and the administrative agencies.[16] Exceptions are made, however, if there would be manifest injustice in requiring a plaintiff to utilize administrative means.

In Drennon v. Philadelphia, the U.S. District Court for the Eastern District of Pennsylvania directed Drennon to pursue administrative remedies.[17] Conversely, in Barnes v. Converse College, Judge Hemphill imposed no such requirement, with regard to the granting of a preliminary injunction at least.[18] This situation may well be resolved as the result of litigation in Crawford v. University of North Carolina.[19] While a preliminary injunction was issued in this case, action on a permanent injunction was stayed, pending the outcome of a complaint to be filed with HEW. The National Center for Law and the Deaf is objecting to this decision based on HEW's Annual Operating Plan and its programmed ability to act on no more than 10% of its new complaints.

There is an obvious change in advocacy style among the handicapped which involves increasing use of the courts. Before leaving this subject, the author feels a few words, quoted from Mr. Frank J. Laski of the Public Interest Law Center of Philadelphia, are in order:

> Questions have been raised as to whether the leading cases in education and treatment provide more the appearance of gains for the handicapped than actual improvement in conditions and reform of the system. It is noted that despite substantial funding increases in education and treatment brought about by court orders, slow and inadequate implementation has lead to motions for contempt, modifications of orders, and further judicial intervention. Those who look to straight line cause and effect relationships between court orders and improvement of services view too narrowly the function of litigation. The use of courts for systems reform is not a one-shot process, nor is it a solitary strategy. The success of the litigation should be evaluated in terms of impact upon other political-legal processes, legislative and administrative; the handicapped person's style and effectiveness of advocacy in other forms; and the development of a systematic capability to use legal resources and pursue legal rights on an individual basis. The evidence is that such capability is developing. Legal action on all levels will continue to grow and, in the long run, lead to a revolution which will change our lives and our relationships with handicapped.[20]

PUBLIC INTEREST LAW

The Civil Rights Attorneys Fees Award Act of 1976, Public Law 94-559, acknowledged the importance of private litigation in enforcing civil rights by allowing the courts to award attorney's fees for civil rights litigations of blacks, hispanics, and women. The Act does not mention Title V of the Rehabilitation Act of 1973. The disabled view this as a frustrating situation. To quote from testimony of Mr. Daniel Yohalem of the Children's Defense Fund before the House of Representatives, "Unfortunately, the disabled citizens who are protected by Section 504 stand alone among minority groups in this country because their rights were not fully protected by the recently enacted Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, and because the legislation

which protects their civil rights contains no attorney's fees provision. Thus, many disabled people, who desperately need to indicate their needs through the courts, have been utterly frustrated and disallusioned because they could neither afford an attorney, locate one able to represent them without a fee, nor seek an attorney's fee award for the courts...."[21]

To correct this flaw, than Congressman Edward Koch, now Mayor of New York City, introduced H.R. 8862 to provide attorney's fees in conjunction with Title V. This proposal has now been included in the proposed Rehabilitation Amendments of 1978 by Representative John Brademas of Indiana.

One system of legal advocacy for certain disabled persons exists under the Developmentally Disabled Assistance and Bill of Rights Act, Public Law 94-103. Regulations implementing the law were issued by DHEW on January 27, 1977 at 42 FR 5273. The Act calls for each state's setting up of a Protection and Advocacy System (P & A), independent of agencies providing habilitation or other services to developmentally disabled persons. The P & A system is charged with pursuing legal or administrative remedies when the individual rights of a developmentally disabled person are threatened. One area where P & A systems are expected to be active is in pursuing of rights under Section 504 of the Rehabilitation Act of 1973.[22]

A key function of the P & A System will be to advocate developmentally disabled citizens rights with regard to the Bill of Rights contained in Section 111 of the Act. This Section guarantees basic human rights

plus the right to treatment, services, and habilitation designed to maximize the developmental potential of a person, provided in a setting that is least restrictive of the person's personal liberty. As decided in U.S. v. Solomon, the United States has no authority to bring a suit to enforce the Bill of Rights for the developmentally disabled, once a State's P & A System is established.[23] Thus, the P & A System has great potential, but also great responsibility.

In New Jersey, the New Jersey Developmentally Disabled Rights Act, signed May 5, 1977, provides similar guarantees to developmentally disabled individuals.

STATE-LOCAL RELATIONSHIPS

In the commentary accompanying the promulgation of the Section 504 Regulation, it is acknowledged that many commentors suggested requiring state agencies to take an active role in the enforcement of Section 504 with regard to local agencies. The Department commented that the possibility warrants further consideration. The only specific requirement mentioned is for State Medicaid Agencies to assure that the Medicaid program is "on the whole" accessible to handicapped persons. In the Notice of Proposed Rulemaking Promulgation, 41 FR 29548, a similar charge is given to the state agency which channels federal funds supporting the day care center program.

Despite this lack of specificity, there must obviously be a relationship between state agencies which receive federal funds and local or private agencies to whom the funds are channeled. The author's

contention is supported by Section 84.4(b) which prohibits providing significant assistance to any agency, organization, or person that discriminates on the basis of handicap and also prohibits any contractural or other arrangement which perpetuates the discrimination of another recipient if both recipients are agencies of the same State. Further support for a relationship is found in Section 84.6(a)(2) which states: "Where a recipient is found to have discriminated against persons on the basis of handicap in violation of Section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action."

Based on the above, the author recommends that state agencies routinely check local or private agencies for compliance with Section 504, at least on a prima facie basis. The author recommends a relationship based on practice from Section 503 administration. Federal contracting agencies make prima facie preaward compliance reviews, including such items as appointment of responsible officials, posting of notices, and publication of an Affirmative Action Plan. Translating this to the Section 504 arena, the author would recommend checking: (1) Submission of Assurance of Compliance Forms; (2) Appointment of a responsible official; (3) Posting of appropriate notices; (4) Possession of Section 504 grievance procedures; (5) Publication of a Transition Plan; and (6) After June 2, 1978, completion of the self-evaluation process.

DISCUSSION QUESTIONS

1. A local school district buys all of its supplies from a local stationary house. Must the school district assure that the stationary house does not discriminate on the basis of handicap?

2. What effect do you think possible rulings on "reverse discrimination" may have upon enforcement of Section 504 of the Rehabilitation Act?

3. Agencies are required to submit an Assurance of Compliance, HEW Form 641 when requesting federal grants. Do you feel this procedure is sufficient or should there be some form of preaward compliance review?

4. I am a disabled client of an agency which receives federal financial assistance from DHEW. The agency has submitted its Assurance of Compliance Form but, in my opinion, still practices discriminatory procedures. I understand the Assurance is in actuality a contract. Do I have any rights as the third party for whose benefit the contract was culminated?

5. In other areas of civil rights litigation, federal agencies have issued so called "right to sue" letters in cases which could not be handled by administrative means. In view of the large complaint backlog, do you think this would be an appropriate procedure for Section 504?

6. I see a new federal building going up which will not be accessible to handicapped persons. Should I complain under Section 504 to OCR or under Section 502 to the Architectural and Transportation Barriers Compliance Board?

7. Do you believe that allowing the award of attorney's fees in cases involving Section 504 is a good idea?

8. How do you view the role of lawyers versus the role of lay advocates in State Protection and Advocacy Systems?

9. Before DHEW can terminate a federal grant on the basis of noncompliance with Section 504, it must notify the House and Senate committees which have jurisdiction over the program involved. Why do you think this requirment exists? Do you agree with this mechanism?

10. Many seem to view the enforcement of Section 504 as a clash between the interests of the general public and the handicapped. Do you believe this is true? In formulating your answer, consider the words of Judge Robert Warren in his decision of Bartels v. Biernat: "...On the other hand, society has a distinct interest in utilizing every possible source of human skill and ingenuity including the skills and talents of mobility handicapped individuals. When effectively confined to a single floor, building or city block, not only are the handicapped deprived of the benefits of society, but society is deprived of the valuable contribution of these otherwise normal human beings and this deprivation is compounded by the fact, when enabled to fend for themselves, the handicapped must depend upon the public purse for their sustenance."

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